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No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HYBUD EQUIPMENT CORP. & BUDOFF IRON & METAL CO.,
Petitioners-Plaintiffs,

v.

CITY OF AKRON, OHIO, JOHN S. BALLARD, RAY KAPPER, ELSIE REAVEN, JAMES R. WILLIAMS, TIM DAVIS, VINCENT CIRACO, ROBERT L. GOEHLER, REGINALD K. BROOKS, KATHLEEN GREISSING, ROBERT J. OTTERMAN, MICKEY ERITANO, JR., JOHN V. FRANK, DON PLUSQUELLIC, WILLIAM C. GRIMM, ROBERT EDWARDS, COUNTY OF SUMMIT, OHIO, MARK RAVENSCRAFT, TED COLES, DON STEPHENS, AND OHIO WATER DEVELOPMENT AUTHORITY,
Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Having determined that the state statute upon which *Parker v. Brown* state action antitrust exemption was claimed "clearly does not express a state preference for regulation — or monopolistic control — of waste disposal" (Opinion, Appendix A at 18a), did the Sixth Circuit err in applying broad delegation-of-power principles to find state action exemption based upon its determination that "the challenged restraints are reasonably related to [the subordinate state] agency's express powers and reasonably designed to promote the state aims within a designated field of regulation"? (*Id.* at 21a).

2. Did the Sixth Circuit err in holding that a city ordinance requiring solid waste collectors to deliver to the city without compensation valuable recyclable materials such as metal and cardboard, acquired by contract from their customers, was not an unconstitutional taking in violation of the Fourteenth Amendment, where the city's purpose is to sell these materials for profit?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are set forth fully in the caption of the case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 742 F.2d 949 and appears in Appendix A herein. The opinion of the United States District Court for the Northern District of Ohio is reported at

1983-1 CCH Trade Cases ¶ 65,356 and appears in Appendix B herein. An earlier opinion of the Sixth Circuit, prior to this Court's remand of the antitrust issue, is reported at 654 F.2d 1187 and appears in Appendix E herein. The earlier opinion of the district court is reported at 485 F. Supp. 671 and appears in Appendix F herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 24, 1984. This petition is filed within the period of time (ninety days) established by 28 U.S.C. § 2101(c)(1976). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following constitutional provisions, statutes and ordinances are quoted in the Appendix.

U.S. Constitution, amend. V (Appendix G)
U.S. Constitution, amend. XIV, § 1 (Appendix H)
Sherman Act, 15 U.S.C. §§ 1,2 (1976) (Appendix I)
City of Akron Ordinance No. 841-1976 (Appendix J)
Ohio Rev. Code Ann. §§ 6123.01 through 6123.18 (Appendix K)
Ohio Constitution, art. XVIII, § 3 (Appendix L)
Ohio Rev. Code Ann. § 715.43 (1953) (Appendix M)
Ohio Rev. Code Ann. § 717.01(C) (1953) (Appendix N)

STATEMENT OF THE CASE

In 1976 the City of Akron, Ohio decided to build a facility that would burn solid waste and generate steam therefrom for sale to local businesses. The City thought this "Recycle Energy System" ("RES") would eliminate the problem of having to locate new land disposal, *i.e.* burial, sites for local

waste and also replace the private steam supplier, Ohio Edison, that had long wanted to discontinue this service. (Appendix A at 3a). The City wanted to finance the RES by revenue bonds and an Ohio state agency, the Ohio Water Development Authority ("OWDA"), agreed to finance the project by issuing revenue bonds. Their underwriters advised that to make the bonds marketable OWDA and the City should take certain actions that would minimize the economic risk of the project. These actions included (a) various commitments among OWDA, the City and Summit County to prevent the creation of competitive facilities and (b) enactment of a city ordinance, No. 841-1976. (Appendix A at 3a-4a).

The ordinance required all solid waste collected in the City to be first offered to the RES for use either as fuel to generate steam or as recyclable material the RES could sell in established scrap markets. The requirement to provide all material to the RES included all valuable recyclable materials — such as paper, cardboard, and ferrous metal scrap — which were mixed with the solid waste, effectively prohibiting other persons from separating such materials out for resale in the scrap markets and requiring them instead to transfer such materials to the RES without compensation. The ordinance also required a "tipping fee" to be paid to the RES for accepting whatever material it wanted, and this fee could be set at whatever level the City deemed necessary to generate the desired revenues (Appendix A at 4a-6a).

Petitioners are private firms that have competed for many years in the waste disposal and recycling markets in Akron and surrounding areas, and they have invested substantial funds in the vehicles and facilities necessary for these operations. Hybud Equipment Corp. is a licensed hauler of waste in the Akron area. Under agreements with various commer-

cial and industrial firms, Hybud collects solid waste in return for a fee. Hybud also agrees to pay these customers for recyclable materials which will be separated from the waste, thus acquiring such valuable materials by contract. An affiliated company, plaintiff Budoff Iron and Metal Corp., operates a transfer station that separates out the recyclables — primarily cardboard and metals — to be sold. Nonrecyclable solid waste is transported to disposal sites where a tipping fee is charged for each ton of waste disposed. Neither of the petitioners' businesses have ever been regulated by the City, although they have been required to obtain city licenses in order to collect waste in the City. These licenses have been routinely granted to any person meeting minimal vehicle and insurance requirements (Appendix E at 102a-104a).

The ordinance affects the plaintiffs' business in several ways. All waste collected within the City limits must be transported to the RES plant and haulers must pay a uniform tipping fee to the RES plant. The RES's exclusive right eliminates any possible competition among disposal sites within the City and prohibits haulers from seeking lower tipping fees at sites outside the City. Furthermore, competition in the separation and sale of recyclable materials by collectors is eliminated by the ordinance because all solid waste and the recyclable materials mixed with it must be delivered to the RES facility. Also, petitioners are not compensated for the valuable recyclable materials they are forced to transfer to the RES.

In early 1978, petitioners filed a complaint in the United States District Court for the Northern District of Ohio, seeking a declaratory judgment that the Akron Ordinance and related measures violated the Sherman Act (15 U.S.C. §§ 1, 2 (1976)), and the United States Constitution's commerce clause (U.S. Const. art. 1, § 8) and its prohibition

against taking property without compensation and denying due process (U.S. Const. amend. V, XIV, § 1). After trial in May, 1979, the district court held that the defendants' actions were exempt from the Sherman Act under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and that the actions complained of violated none of the constitutional provisions noted (Appendix F). On appeal to the United States Court of Appeals, the judgment for the City was affirmed. The Court of Appeals held that the Tenth Amendment to the Constitution and this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), barred application of the Sherman Act. It held that the commerce clause was not offended because the restraint on interstate commerce in recyclables was indirect and justified by the local purpose of the City. It rejected petitioners' taking argument, reasoning that, since the development of the RES was a legitimate police power function, the City could help to offset the cost by taking petitioners' recyclables and selling them. (Appendix E)

Petitioners sought *certiorari* from this Court with respect to the antitrust exemption and taking issues (No. 81-723). Following this Court's decision in *Community Communications Co., Inc. v. City of Boulder, Colo.*, 455 U.S. 40 (1982), this Court granted *certiorari*, vacated the judgment and remanded this case for further consideration in light of that decision. 455 U.S. 931 (1982) (Appendix D). Following the remand and based on the original record in this case, the district court again held that the actions of the defendants were exempt from the antitrust laws under *Parker v. Brown* on the ground that the statutes governing OWDA constituted a clearly articulated and affirmatively expressed state policy for OWDA to displace competition by authorizing Akron to enact the ordinance monopolizing the businesses of separation of recyclable materials and disposal

of waste. The Sixth Circuit affirmed the holding that the state action exemption applies here, though on different grounds; it held that the Ohio statutes governing OWDA do *not* reflect such a state policy, but that the state action exemption could be applied to actions of this subordinate state agency under broad delegation-of-power principles.

It is undisputed that the effect of the actions petitioners challenge is to eliminate competition by petitioners with the City in the waste disposal and recycling businesses in Akron, that interstate commerce is affected, and that, if engaged in by private firms, these actions would violate the Sherman Act. (Appendix E at 116a-118a) No provision of state law requires the City to take these actions or expresses any policy of the State preferring governmental monopoly over competition in waste disposal and recycling fields, even as a means of assuring the profitability of an OWDA-financed facility (Appendix A at 18a-19a; Appendix E at 87a). It is also undisputed that petitioners' competitive activities pose no problem of public health or safety that the City wishes to remedy, but, rather, that OWDA and the City are restraining petitioners' activities and taking their property solely to ensure the financial success of the RES (Appendix E at 64a, 78a).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Has Articulated A New Standard For Applying the State Action Exemption to Subordinate State Agencies Which Is In Conflict With, And Will Undermine, The Holdings And Rationales Of A Number Of The Court's Decisions Over The Past Decade.

In its decision below, the Sixth Circuit has articulated a new standard for determining whether the actions of subordinate state agencies are within the *Parker v. Brown* state action exemption from the antitrust laws. Under this new

standard, the court has abandoned the central focus over the past decade of this Court's decisions: whether the State as sovereign (here the state legislature) has contemplated the issue and has reached a clearly articulated and affirmatively expressed state policy to displace competition in a particular area.

Instead, the Sixth Circuit has held that, even though the state legislature has *not* focused on the issue, the state action exemption may be applied to a subordinate state agency when the course of action chosen by the agency is *within its discretion under broad delegation-of-power principles.* This new standard would undo much of this Court's work in this area over the past decade and jeopardize important national values. Further, the way in which the Sixth Circuit has applied this new standard to the facts of this case shows that it is a nonconfining standard which, if allowed to stand, would open the door to a plethora of decisions by lower-level state officials to restrain competition in ways never contemplated by any state legislature. This issue is *not* presented in *Town of Hallie v. City of Eau Claire* (No. 82-1832), and its importance in the administration of the antitrust laws supports a grant of *certiorari.*

The Sixth Circuit recognized that the statutes governing OWDA did *not* constitute a clearly articulated and affirmatively expressed state policy allowing the monopolization of the business of separating recyclables and disposing of solid waste to assure the profitability of facilities financed by OWDA. (Appendix A at 22a). It detailed this conclusion as follows:

> Although OWDA may have the power to enter into the agreement now in issue, the statute clearly does not express a state preference for regulation — or monopolistic control — of waste disposal. OWDA's existence

> and function are perfectly consistent with a regime of open and free competition among private businesses that engage in waste disposal. Nothing in the statute declares a state policy regarding the organization of municipal waste disposal systems. As to the type of projects OWDA may finance — whether the projects monopolize or merely compete with private industry — the statute is silent. (Appendix A at 18a-19a).

However, while holding that the state action exemption was *not* available under the standards established by this Court, the Sixth Circuit went on to hold that the exemption could be applied under a new delegation-of-powers standard which it adopted.

The Sixth Circuit asserted that there was a crucial ambiguity in prior decisions of this Court: whether administrative policymaking under an ambiguous or open-ended regulatory statute by a state agency with delegated broad policymaking discretion can constitute State action under *Parker v. Brown*. (Appendix A at 17a-18a & n. 9) The court acknowledged that a decision by such a state agency would not necessarily be the same decision which the state legislature would reach, since such an agency "will rarely find that only one course of action is available to accomplish its mission." (Appendix A at 20a) The court may also have been confused regarding whether as exacting a standard applies to subordinate state agencies with state wide jurisdiction as to municipalities. (Compare Appendix A at 13a with 14a).

Based on these considerations, the court adopted a new delegation-of-power approach. It held that the state action exemption from the antitrust laws could be applied where:

> . . . the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of an agency's authority. If the challenged restraints are reasonably related to an agency's express

> powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a "clearly and affirmatively expressed state policy" to displace competition. (Appendix A at 21a) (footnote omitted)

Thus the court turned away from focusing on what the legislature intended (derived from either direct or indirect evidence) and instead focused on the "reasonableness" of decisions by a subordinate, nonsovereign state agency. It held, in effect, that if an action is within the agency's discretion under broad delegation-of-powers principles, it will be found to be within the state action exemption just as if the state legislature itself had contemplated the particular action.

The approach articulated by the Sixth Circuit stands alone[1] and is completely at odds with this Court's decisions

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[1]The Sixth Circuit cites several other decisions as adopting the same approach (Appendix A at 21a-22a n. 14), but we submit it has misread those decisions. In *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3039 (July 25, 1983) (No. 83-138), the Eighth Circuit held that state statutes clearly and specifically authorized cities to take the challenged action. 705 F.2d at 1011-12. As to whether the state intended thereby to create anticompetitive consequences, the court held it sufficient if the anticompetitive results were a necessary or reasonable consequence of engaging in the authorized activity. Thus its opinion does not hold that a subordinate state agency may initiate the idea of taking an action which is a restraint of trade. In *First American Title Co. of South Dakota v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1453-54 (8th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 709 (1984) and in *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982), state statutes had explicitly authorized various actions restraining trade, and the subordinate state regulatory agencies merely added details or made deci-

over the past decade. In these decisions, this Court has made it clear that anticompetitive actions of a subordinate state agency (such as OWDA) or of a municipality are covered by the state action exemption from antitrust liability *only* if taken pursuant to a clearly articulated and affirmatively expressed policy of the State (*i.e.*, state legislature or supreme court) to displace competition with regulation or monopoly public service. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Community Communications Co., Inc. v. City of Boulder, Colo.*, 455 U.S. 40 (1982); *Hoover v. Ronwin*, ___ U.S. ___, 104 S. Ct. 1989 (1984).

Goldfarb is very instructive here. There the Court dealt with whether the state action exemption applied to actions by a subordinate state agency (the state bar) which were within its broad powers. Though not explicitly adverting to

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sions among options explicitly provided by the statutes. These were situations very different from this case, where it is acknowledged that the legislature did not address this issue at all and OWDA has no authority to develop regulations going beyond the terms of the statute. And in *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982), although the state statute did not specifically address the authority of the state agency to set jockey fees, the Third Circuit found, from the regulatory authority given the agency and the purpose of the legislature in enacting the statutes, that the legislature *intended* the agency to take such actions. Such a rationale would not exempt the actions of OWDA, since OWDA is a limited power agency and the Sixth Circuit recognizes one cannot infer the legislature intended OWDA to take the challenged actions. The Third Circuit in *Euster* kept the focus on legislative intent, while the Sixth Circuit has turned away from that to broad delegation-of-power principles.

delegation-of-power principles, the Court in effect rejected the applicability of those principles to the state action exemption by holding that the action of the state bar was not within the state action exemption because, even though within its broad powers, the action reflected the state bar's own decision and not a policy adopted by the "State acting as sovereign" (*i.e.* either the legislature or supreme court). 421 U.S. at 790.

This Court recently reaffirmed the applicability of this rule to subordinate state agencies, though in dictum, in *Hoover v. Ronwin*. There the Court stated that when dealing with activity of nonsovereign state agencies, "it becomes important to ensure that the anticompetitive conduct of the State's representative was *contemplated* by the State" (*i.e.* the state legislature or, when acting legislatively rather than judicially, the state supreme court). 104 S. Ct. at 1995 (emphasis added, citations omitted). And in several other cases dealing with municipalities the Court has defined in more detail the requirement that the State has "contemplated" the kind of action involved. Thus Justice Brennan's opinion for the plurality in *Lafayette* quoted with approval the Fifth Circuit's earlier holding in that case that a court may find, from "the authority given a governmental entity to operate in a particular area, that the legislature *contemplated* the kind of action complained of." 435 U.S. at 415 (emphasis added). The Fifth Circuit's opinion had made clear, in the sentence immediately preceding the quoted language, that the focus was on evidence of legislative intent, not broad delegation-of-power principles: "[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was *clearly within the legislative intent.*" *City of Lafayette, La. v. Louisiana*

Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976) (emphasis added).

This Court made the same point in *Boulder*, where it rejected an argument by a municipality very similar to the approach adopted by the Sixth Circuit. The Court there said:

> A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies *an affirmative addressing of the subject by the State.*
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> * * *
>
> Acceptance of such a proposition — that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances — would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. 455 U.S. at 55-56 (emphasis added).

Thus this Court's rulings are clear that a decision for a subordinate state agency or a municipality to restrain competition is exempt from the antitrust laws under *Parker v. Brown* only if the decision is made by the State as sovereign, and not if made by the subordinate state instrumentalities within broad delegations of power.

Recognition of the delegation-of-power principle adopted by the Sixth Circuit would undermine the rationale of the Court's prior decisions and jeopardize important national values. Those decisions have held that the limits of the state action exemption are defined by the facts that States are sovereign except as Congress constitutionally subtracts

from their authority, but that instrumentalities of a State are not themselves sovereign. Such instrumentalities have parochial interests, whether because of their limited geographical jurisdiction (a municipality) or their narrow substantive charter (such as this state agency, authorized only to finance solid waste facilities). Indeed, state agencies arguably have even less claim than municipalities to independent policy-making power because they are *not* elected bodies, and may be far removed from representative policy makers. Additionally, the Sixth Circuit decision — by focusing on whether the agency's decision is "reasonably related" to an agency's powers and "reasonably designed" to promote state aims, rather than on whether the state legislature contemplated such action — would result in the federal courts becoming the makers of policy as to whether it is reasonable or desirable for competition in a particular area to be displaced. This Court has in the past avoided such a role for the federal courts.

The extent of the Sixth Circuit's misdirection is shown by the results in this case. The effect of the Sixth Circuit's decision is that any subordinate agency, no matter how limited its authority, would be given the power to create exempt restraints of trade. OWDA, the state agency involved here, is *not* a regulatory agency. It has no power to make policy decisions or to adopt rules and regulations limiting private activity or to enforce any rules. It is merely a state financing agency that is authorized to issue bonds and lend funds to develop solid waste disposal facilities; to adopt internal, procedural rules; and to make normal commercial agreements with entities to which it lends funds.[2]

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[2]The Sixth Circuit drew comfort (Appendix A at 23a-25a) from *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983), pet. for cert. filed, 52

Additionally, the use of competitive restraints here was *not* the only way to finance Akron's facility.[3] And finally, the involvement of the City of Akron added no ingredient of State policy favoring restraints of trade. Neither the district court nor the Sixth Circuit on remand found that the stat-

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U.S.L.W. 3441 (Nov. 18, 1983) (No. 83-825) ("*CIRS*"). Without agreeing that CIRS was correctly decided, we note that both the statutory scheme and facts were different there. First, an Iowa statute *mandated* that every city and county provide for disposal of solid waste; no such requirement exists in Ohio statutes. Second, the district court found that the *only* feasible way in which solid waste facilities could be constructed was through the issuance of revenue bonds; there is no such finding here and the evidence would not support one. Third, when revenue bonds were used, an Iowa statute explicitly *mandated* that fees and charges be levied "as will always provide revenues sufficient to pay" operating costs, bond obligations and reserve requirements. No such mandate exists in the OWDA statute. And fourth, that case involved foreclosure only of a competing landfill operation, whereas here OWDA and the City seek to go beyond the disposal of solid waste to assure that they will be free from competition in the recycling of cardboard and ferrous products. *CIRS* therefore has no value in determining whether the Ohio General Assembly intended OWDA and Akron to take the challenged anticompetitive actions.

[3]There were several other alternatives for financing the facility. Akron could have used general obligation bonds rather than revenue bonds, but it chose not to do so because it did not wish to put the issue to the city voters. Additionally, Akron could have pursued long term contracts with waste suppliers to assure a steady supply of waste, but chose not to do so. As a general matter, other similar facilities around the country have used approaches other than revenue bonds and monopolization of solid waste disposal and separation of recyclable materials in order to finance such facilities. Trial Transcript 236-242, 842-843; Donnelly Dep. Transcript 147-148. It should be noted that the Sixth Circuit did not hold that monopolization was essential to finance the facility, but only that it was a reasonable part of the particular plan chosen by OWDA and Akron for financing the facility. (Appendix A at 23a).

utes authorizing cities to regulate garbage disposal facilities constituted the necessary State policy to displace competition in the separation of recyclable materials and disposal of solid waste.[4] Indeed, the most surprising aspect of the Sixth Circuit's decision was that — having found that neither OWDA's governing statutes nor the statutes applicable to Akron constituted a clearly articulated and affirmatively expressed state policy to displace competition in this fashion — it went on to find that the ordinance and agreement among the defendants were within the state action exemption because they bore a "reasonable relationship" to the two groups of statutes. (Appendix A at 23a) Somehow, zero plus zero added up to one.

We submit that the Court should grant *certiorari* in this case because the Sixth Circuit has articulated a new standard for applying the state action exemption which is in clear conflict with the prior decisions of this Court.

II. If This Court Were To Reverse The Seventh Circuit In *Town of Hallie v. City of Eau Claire*, This Case Would Be Controlled Thereby.

As we explain in section I above and section III below, this case is worthy of *certiorari* regardless of the Court's decision in *Town of Hallie v. City of Eau Claire*.

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[4]The two statutes cited by the Sixth Circuit (Appendix A at 22a-23a) do not reflect a State policy to monopolize the disposal of solid waste much less to monopolize the separation and resale of valuable recyclable materials from solid waste. Further, the two old decisions of the Ohio Supreme Court referred to by the Sixth Circuit (*Id.* at 23a) did not address the question whether the legislature had contemplated monopolization, but held only that monopolization of the disposal of solid waste was permissible under the broad home rule power of Ohio cities, and that the state statutes did not limit that broad rule power. *Boulder* has made clear that broad home rule powers are not a basis for the state action exemption.

However, if the Court were to determine not to grant *certiorari* on issues I and III, and if the Court were to reverse the decision of the Seventh Circuit in the *Hallie* case, this case would be controlled by such a decision. This is because in this case (a) there was no compulsion by the State for the use of monopoly, but at most a permissive decision under state law to utilize such a restraint; (b) there was no recognition by the State of the anticompetitive effects of requiring that all separation of recyclable materials and disposal of solid waste be done by a city-owned facility; and (c) there is no active supervision of the anticompetitive aspects of the city ordinance. We will not brief these issues, since they are covered in detail in the briefs on the merits submitted in the *Hallie* case. If the Court should decide not to grant *certiorari* on issues I and III and if it should reverse the *Hallie* decision, we submit that this case should be remanded for further consideration in light of the Court's decision in *Hallie*.

III. The Sixth Circuit Erred In Holding That A City's Appropriation Of Recyclable Metal And Cardboard For The Purpose Of Increasing The Revenues Of A City Facility Did Not Constitute An Unconstitutional Taking Of Property.

The Ordinance's requirement that valuable recyclable materials — acquired by petitioners for separation from other solid waste and then resale — must instead be provided to the RES without compensation is an unconstitutional taking of property for a public purpose. These materials are valuable property which petitions acquire from waste generators by contract. Petitioners have separated such materials over a number of years, using facilities in which they have invested substantial funds. The Sixth

Circuit in its original decision[5] held that, since construction of the RES was within Akron's police power, Akron may "appropriate" valuable recyclable materials without compensation "in order to pay part of the general social costs of waste disposal" (Appendix E at 72a). We urge the Court to grant *certiorari* on this issue because, if allowed to stand, the Sixth Circuit's decision would allow a city to appropriate property without compensation wherever it intended to use the proceeds from its sale of the property to support an activity within its police power.

The consistent rationale of this Court's "taking" cases is that when economic loss is the result of government's enhancement of its own resource position, compensation is constitutionally required; but when loss, however severe, is the consequence of the government's arbitrating between conflicting interests, such as to abate a public nuisance, the result is a noncompensable exercise of police power. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *United States v. Causby*, 328 U.S. 256 (1946).[6] Akron's action is a clear violation: it is a physical taking of valuable materials to be sold for recycling or to be used in generating steam for sale to city businesses. The materials involved are non-noxious;[7] if not taken by Akron they would

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[5]The taking issue is properly raised here. When the Court earlier granted *certiorari* and remanded this case (Appendix D), it did not pass on the taking issue. It merely remanded the case for further consideration of the state action exemption issue in light of *Boulder*; thus leaving the taking issue open for future consideration by this Court if the case were not resolved in petitioners' favor on remand.

[6]*See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 135 (1978); *Armstrong v. United States*, 364 U.S. 40, 49 (1960); Sax, "Takings and the Police Power," 74 Yale L.J. 36, 63 (1964).

[7]The Sixth Circuit acknowledged that these materials posed no health concern (Appendix E at 64a, 78a).

continue to be sold by petitioners for reuse. These materials would not be disposed of in landfills, and therefore they are unrelated to any concerns about diminishing landfill capacity in the area.

The Sixth Circuit cited no support for its reliance on the fact that the revenues generated from the appropriated property would support waste disposal.* If the Sixth Circuit's rationale were correct, it would be tantamount to saying that, because the RES serves a valid police power objective, Akron may condemn land on which to build it and pay no compensation to the owner. That surely is not the law.

The Sixth Circuit also reasoned that the Ordinance was justified by Akron's interest in maintaining a steam supply for downtown businesses and the need to have these recyclable resources in order to produce that steam efficiently (Appendix E at 72a). Again the court was confusing the legitimacy of an ultimate goal with the legitimacy of a means to that end. What a city intends to do with the revenues it earns does not alter the fact that taking private property for the purpose of selling it is unconstitutional unless the owner is compensated. If the court's rationale were sound, it would allow Akron to appropriate, without compensation, petroleum from local oil companies on the ground that the petroleum was needed to run the steam generating plant.

In *Andrus v. Allard*, 444 U.S. 51 (1979), this Court held that a prohibition on the sale of valuable eagle feathers was

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*Indeed, in discussing the factual background of this case, the Sixth Circuit pointed out that one-half of the revenues recovered from the City's sale of petitioners' appropriated recyclables would be "used to offset operating expenses," but conceded that the other half would simply be kept by the private company designated by the City to operate the RES. (Appendix A at 6a)

not a taking, emphasizing that the challenged law did "*not compel the surrender of the artifacts* . . . [I]t is crucial that appellees retain the right to possess and transport their property, and to donate or devise the protected birds." *Id.* at 65-66 (emphasis added). Clearly, the Court's holding and language indicate that had the statute forced surrender of valuable artifacts to the government the result would have been different. Here, Akron has "compel[led] the surrender" by petitioner of valuable recyclables; it has forced petitioner to give these materials to the City for the City to sell for itself. The City has not just destroyed or impaired one "strand" of the "bundle of rights" that constitute property; it has appropriated the whole bundle for its own commercial use. *Id.*

The Sixth Circuit relied heavily on two old Supreme Court cases, *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); and *Gardner v. Michigan*, 199 U.S. 325 (1905). In doing so, the court misconstrued their holding. These cases considered the validity of municipal ordinances which mandated destruction of all the cities' garbage by companies with exclusive franchises to perform the task. The garbage at issue was butchers' offal, putrid animal or vegetable matter, any fish, flesh, or food, and any dead animals. The Court found that the cities' actions were motivated by public health concerns based on the threat of disease and noxious odors and gases if the garbage were not properly disposed of. The Court also noted that feeding garbage to cows and hogs was widely considered the cause of disease. In the face of an argument by those challenging the ordinances that the garbage had value as animal feed, the Court held that "[t]he exercise of the police power by the *destruction* of property which is *itself a public nuisance* . . . is very different from taking property for public use. . . ." *California Reduction Co. v. Sanitary Reduction Works*, 199

U.S. at 324, quoting from *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (emphasis added).

The facts in this case are different in two critical respects. First, the conceded purpose of the challenged ordinance is not the destruction of property but instead its acquisition by the City. The Sixth Circuit found (Appendix E at 64a) — and the ordinance in its preamble acknowledges (Appendix J at 128a) — that the purpose of the ordinance is to require cost-free transfer to the City of valuable materials to assure a high level of revenues for the RES. The metal and paper will be sold to recycling markets by the RES just as petitioners now do, except in those cases where the RES determines it can earn more revenues by burning the paper materials to generate steam because of their high BTU content. *California Reduction Co.* and *Gardner* would have been more like this case — and this Court surely would have reached the opposite result — if instead of depriving the plaintiffs of the value of garbage as animal feed so that it could be destroyed, the city there had appropriated the garbage to feed to city-owned hogs so as to increase city revenues from the sale of pork.

The second respect in which this case is different from the two 1905 cases is that the materials involved are different in kind and do not involve any problem of nuisance or public health. Since 1905 the nature of solid waste has changed radically. Today only about 20% of typical municipal refuse is garbage, while about 36% is paper and cardboard and about 8% is metal.[9] The recyclable materials at issue here are non-noxious paper, cardboard and metal which do not present any public problem. These materials were not even included

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[9]Report of Bureau of Mines, reproduced in appendix to dissent of Justice Douglas in *United States v. SCRAP*, 412 U.S. 669, 699, 715 (1973).

in the definition of garbage in the 1905 cases. The proof that these materials present no public problem is that the materials would not end up in landfills if Akron did not take them, and that the RES when it does take them would treat the materials in the same commercial fashion as petitioners unless it could earn more revenue by burning the cardboard. The City is simply supplanting petitioners in selling these materials in interstate and foreign commerce.

The Sixth Circuit also reasoned that Akron could have taken over the collection of solid waste completely and that, therefore, it could adopt the less restrictive alternative of merely taking what private collectors acquired from waste generators. Two responses are appropriate. First, it is not clear that the City could take over the business for the avowed purpose of making profits.[10] And even if it could take over the entire waste business, it could not force waste generators to give up valuable recyclable materials such as these without compensation. *Allard, supra.* As discussed above, Petitioners receive these materials from such generators by contract and have the same property rights in them as the generators.

Second, the City did *not* take over the entire business. It did not prohibit the continued operations of private collectors and haulers who have been operating in the City for approximately forty years. It merely took their property. It is not the law that when a government has power to displace

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[10]As this Court very recently held, a long history of behavior assented to by the government can lead to the fruition of a number of expectancies embodied in the concept of "property" — expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the management of the landowner's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). The long history of properly conducting business by Hybud and Budoff reinforces the traditional property concepts at stake.

a private industry completely, it also has the power to appropriate the property of that industry. According to this logic, Akron could appropriate virtually anything. If it can take over the business of generating electricity, then it could force power companies to provide their electricity for free to satisfy its own requirements and also to sell energy to others at a profit.

Petitioners submit that it was for the very purpose of barring such uncompensated takings for public use that the constitutional prohibition was established. Just because a taking of property is intended to help finance the government's exercise of its police power does not mean there is any exemption from the requirement of compensation.

CONCLUSION

For two reasons we suggest that this case is appropriate for a grant of *certiorari* and a hearing on the merits. First, the Sixth Circuit's decision introduces a new standard for determining whether actions of a subordinate state agency are within the *Parker v. Brown* state action exemption from the antitrust laws, *i.e.* whether the actions are within the agency's powers under broad delegation-of-powers principles. That standard is in conflict with a number of decisions of this Court and will cause confusion in the lower courts. Second, this case presents a question involving the constitutionality of a city's appropriating private property without compensation to finance public works. Guidance for the lower courts on both issues would be very useful.

In addition, this case raises several issues which are involved in *Town of Hallie v. City of Eau Claire*, which is pending in this Court. If the Court were to decide not to grant *certiorari* on the above issues and were to reverse the

decision of the Seventh Circuit in *Hallie*, this case should be remanded for consideration in light of that decision.

Respectfully submitted,

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Dated: November 21, 1984

APPENDIX

APPENDIX A

No. 83-3306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HYBUD EQUIPMENT CORP., et al.,
Plaintiffs-Appellants,

v.

CITY OF AKRON, OHIO, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed August 24, 1984

Before: MERRITT and MARTIN, Circuit Judges; BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge, delivered the opinion of the Court, in which MARTIN, Circuit Judge, concurred. MERRITT, Circuit Judge, (pp. 29) delivered a separate concurring opinion.

BAILEY BROWN, Senior Circuit Judge. This case, which now makes its third appearance before this court, is one of the increasingly frequent challenges under the federal antitrust laws to the actions of state and municipal bodies. These actions raise fundamental questions about the balance of federal and state power and pose the inherent conflict between

the national policy of free competition and the anticompetitive consequences of state regulation. This rapidly evolving area of the law portends far-reaching changes in the role of the federal courts in reviewing the exercise of regulatory authority by the states and, ultimately, in the relationship between states and their political subdivisions.[1]

The plaintiffs in the instant case allege that the City of Akron, as part of a comprehensive program to dispose of solid waste and create steam energy, has monopolized the business of solid waste processing in violation of the Sherman Antitrust Act. 15 U.S.C. § 1 *et. seq.* The defendants, including the City and a state agency, contend that their actions are protected by the "state action exemption" to the antitrust law developed by *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny. The plaintiffs appeal from summary judgment holding that the defendants' actions were within the state action exemption and therefore immune to antitrust attack.

I.

A. History of the Recycle Energy System and the Ordinance Under Challenge.

The facts in this case are set forth in detail in the original district court opinion, *Glenwillow Landfill, Inc.* v. *City of*

[1] The implications of recent Supreme Court decisions in this area have provoked much scholarly discussion. *See e.g., Posner, The Proper Relationship between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown*, 69 Nw. U. L. Rev. 71 (1974); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305; Areeda, *Antitrust Immunity for State Action After Lafayette*, 95 Harv. L. Rev. 435 (1981); Civiletti, *The Fallout from Communications Co.* v. *City of Boulder*, 32 Cath. U. L. Rev. 379 (1983). These decisions have also given rise to much litigation presenting serious and unsettled questions. *See e.g., Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (June 11, 1984) (No. 82-1852); *Central Iowa Refuse System* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3441 (U.S. Nov. 18, 1983) (No. 83-825.

Akron, 485 F. Supp. 671 (N.D. Ohio 1979). Those facts relevant to the issues before us are summarized below.

The plaintiffs in this case challenge an ordinance adopted as part of a plan to solve two pressing problems confronting the City of Akron. In the late 1960's, Akron had exhausted all but one sanitary landfill for solid waste disposal. A proposal to open a new site encountered immediate legal challenges. As the City struggled to find alternatives for waste disposal, Ohio Edison petitioned the Public Utilities Commission to permit the company to abandon its steam heating system and halt the supply of steam for Akron's downtown business district.

In an effort to find a single solution to its difficulties, the City began to consider constructing a "Recycle Energy System" ("RES") to convert solid waste into steam. After several studies and a public hearing, the City Council, in April 1973, authorized the City administration to retain a firm to design an RES project. By December 1974, final plans and specifications were completed and construction contracts were let out for bid. Financing, however, proved to be a substantial barrier. The City intended to issue revenue bonds to finance the project, but in mid-1975 the underwriters for the bond issue informed the City that the bonds would not be marketable.

The City turned to the Ohio Water Development Agency ("OWDA") for assistance, and in September 1975, OWDA agreed to finance the proect by issuing revenue bonds. When OWDA found that the bond issue could not be secured by the City's general fund, the proposed financing package was restructured with new underwriters. The new underwriters renegotiated steam supply contracts for the project and required the creation of a special contingency fund by the City and county governments to cover construction cost overruns. The underwriters also determined that the RES must be assured a steady supply of waste in order to market the bonds. Following this evaluation, the City and OWDA decided that it would be necessary to require, by ordinance, that all solid waste col-

lected within the City limits be transported to the RES facility.

In 1976, the City and OWDA entered into a Cooperative Agreement to finance the RES project. Section 5.5 of the Agreement provides that the City ("LGA") covenants with the OWDA for the benefit of the bond holders that:

> I. For the term of this Agreement, the LGA shall require that all collectors and haulers of Solid Waste within the LGA be licensed by the LGA and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the LGA which is acceptable for disposal by the Project to be delivered to the Project for disposal through the Project and require that such haulers and collectors and the LGA pay or cause to be paid the fees and charges imposed by the LGA for the disposal of Solid Wastes at the Project. The LGA will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the LGA and which is acceptable for disposal by the Project, to be delivered to the Project for disposal through the Project.

The Agreement further provides that the City would prohibit the establishment of alternative waste disposal sites.[2] In December 1976, the OWDA issued an Official Statement announcing the offering of $46,000,000 of special obligation bonds to

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[2] Two other sections of the Agreement provide:

> H. The LGA will not establish, construct or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal by the Project, and further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. The LGA System shall not charge to or collect from the Project. . . .
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> O. . . . The LGA shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the Project at a level which assures an adequate supply of Solid Waste for the purpose of the Project and, subject to the foregoing, shall be comparable with competitive charges for such services. . . .

finance the project. The Statement contained a copy of the Cooperative Agreement.

To carry out the terms of the Agreement, the Akron City Council adopted Ordinance No. 841-76 in October, 1976. The ordinance requires all rubbish collected within the corporate limits of the City to be deposited at the RES plant. The ordinance also authorizes the Director of Public Service to establish a service charge ("tipping fee") for disposal of solid waste at the RES facility. Persons who violate the ordinance may lose their licenses and face criminal prosecution.[3]

Before the adoption of the ordinance, plaintiff Hybud Equipment Corp. was a licensed hauler of waste in the Akron area. Under agreements with various commercial and industrial firms, Hybud collected solid waste in return for a fee. An affiliated company, plaintiff Budoff Iron and Metal Corp., operated a transfer station that separated out recyclables — primarily cardboard and metals — to be sold. Nonrecyclable

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[3] Section 1(a) of the ordinance provides:

> Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the Holder of a rubbish bailer's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated by the Mayor.

Section 2 provides:

> No person, except duly authorized collectors of the City or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal.

solid waste was transported to landfills where a tipping fee was charged to the haulers for each ton of waste disposed.

The ordinance affects the plaintiffs' business in several ways. All waste collected within the City limits must be transported to the RES plant and haulers must pay a uniform tipping fee to the RES plant. This exclusive right eliminates any possible competition among disposal sites within the City and prohibits haulers from seeking lower tipping fees at sites outside the City. Furthermore, the separation and sale of recyclable materials by collectors is curtailed by the ordinance. All solid waste — including waste containing recyclables — must be delivered to the RES facility. Recyclable materials may be burned as fuel or separated by the plant operator and sold to generate additional income. As part of an incentive agreement, the operator of the plant, Teledyne National, is permitted to retain one-half of all revenues recovered from the sale of recyclable materials. The remainder is to be used to offset operating expenses.

B. Prior Proceedings

The plaintiffs brought suit in federal court alleging that the ordinance and agreement deprived them of due process, constituted a restraint of commerce, and violated the Sherman Antitrust Act. In *Glenwillow Landfill, Inc.* v. *City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979), the district court awarded summary judgment to the defendants on all issues.

The district court ruled that the defendants' activities were protected from antitrust liability under the state action exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943). The district court rested its decision on two alternative grounds. First, the court found that OWDA was acting for the state in advancing legitimate state interests. The restrictions in the Cooperative Agreement, the court found, were within OWDA's authority to finance solid waste facilities. This exercise of this state power, the court held, was beyond the reach of the antitrust

laws. 485 F. Supp. at 676-77. Second, the court found that the state of Ohio had authorized the City of Akron through its home-rule powers to regulate waste collection. "[T]he Ohio Constitution declares that cities act as agents of the state when they exercise governmental powers within their city limits." 485 F.Supp. at 677. The Ohio courts, moreover, had held that such power could lawfully be exerted through a monopoly. Therefore, the district court concluded, the state action exemption protected the City's exercise of state power.

The district court's decision was affirmed on appeal. *Hybud Equipment Corp.* v. *City of Akron*, 654 F.2d 1187 (6th Cir. 1981). The collection of garbage and the operation of incineration plants, this court noted, were within the traditional activities of local governments. The home-rule provisions of the Ohio Constitution as interpreted by the State Supreme Court authorized municipal monopolies to carry out these functions. Moreover, an agency of the state, the OWDA, would oversee the exercise of this authority. Thus, this court held that the ordinance and agreement were immune from antitrust liability as actions of the state.

The Supreme Court granted the plaintiffs' petition for writ of certiorari and vacated this court's judgment. The case was remanded for consideration in light of the Court's decision in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). *Hybud Equipment Corp.* v. *City of Akron*, 455 U.S. 931 (1982). This court, in turn, remanded the case to the district court with instructions to reconsider only the plaintiffs' claims under the Sherman Antitrust Act.

On remand, the district court again held that the defendants' activities were protected by the state action exemption. Eschewing this court's reliance on Akron's home-rule powers, the district court found "sufficient grounds for antitrust exemption within the Ohio statutes governing the OWDA." The court found that these statutes demonstrated that the state legislature contemplated the anticompetitive consequences of OWDA's exercise of its bonding authority. This expression

of state policy coupled with OWDA's supervision of the RES project, the district court held, shielded the City from liability under the federal antitrust laws and satisfied the requirements of *City of Boulder*. This determination is the sole issue now before us.

II.

A. The Development of the State Action Exemption.

The Supreme Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), the original declaration of the state action exemption, continues to exert a strong influence on the recent development of that doctrine.[4] In *Parker*, the Court considered whether a state program restricting agricultural production could be attacked under the Sherman Act. Under California's Agricultural Prorate Act, the State Agricultural Prorate Advisory Commission authorized the creation of local cooperatives to establish marketing policies for raisin production. The Commission, appointed by the Governor pursuant to the statute, had to approve the cooperative's plans. To become effective, these plans then had to be ratified by a specified number of the producers in each area.

In *Parker*, the Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. Absent a clear indication from Congress, the States are entitled to immunity as an aspect of the federal system. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed

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[4] "In the years since the decision in *Parker*, the Court has had occasion in several cases to determine the scope of the state action doctrine. It has never departed, however, from *Parker's* basic reasoning." *Hoover* v. *Ronwin*, —— U.S. ——, 104 S.Ct. 1989, 1995 (1984).

to Congress." *Id.* at 351. The Court held that the prorate program was protected by this immunity. "It is the state which has created the machinery for establishing the prorate program." The participation of private producers and the referendum system did not detract from the character of the program. "The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions." *Id.* at 352.

The decisions following Parker have been primarily concerned with determining the nature and extent of state involvement necessary to establish the exemption. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court considered a challenge to minimum fee schedules established by a county bar association and enforced by the state bar. Although the state bar was a "state agency" for purposes of investigating and reporting violations of disciplinary rules, the final statutory authority for regulating the practice of law was vested in the state supreme court. The state supreme court, however, had not directed the establishment of such schedules. The Court rejected the argument that the schedules were protected because they "complemented the objectives of the ethical codes." To claim the protection of the exemption, "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather the anticompetitive activities must be compelled by direction of the State acting as sovereign." 421 U.S. at 791. Because the state, acting through the legislature or through the state supreme court, had not directed or authorized the anticompetitive action, the Court held that the schedules were not exempt from the Sherman Act as state action.

The implication of *Goldfarb* is that a rule adopted by a sovereign authority of the state would be entitled to antitrust immunity. The Court followed this reasoning in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and granted immunity to a rule adopted by the state supreme court banning the adver-

tising of legal services. The measures, the Court held, "reflect a clear articulation of the State's policy with regard to professional behavior." The Court also found it significant that "the state policy is so clearly and affirmatively expressed and that the state's supervision is so active." 433 U.S. at 362. The Court in *Bates* stressed the difference between the facts of that case and the situation presented in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). In *Cantor* a state public utility commission approved a utility's practice of distributing light bulbs for no charge and passing the costs to consumers through their utility bills. The Court held that the commission's acquiesence in the program was insufficient to immunize the practice as state action. The Court found that the challenged program bore a remote relationship to the regulatory aims of the state, and, with respect to light bulb sales, there was no official state policy to displace competition.

In *Parker*, the anticompetitive conduct under attack was directed by the state legislature and supervised by state officers. In *Bates*, the rules in question were adopted by the state supreme court acting in its capacity as a legislative body with ultimate authority over the legal profession. In such cases, the challenged restraints are easily ascribed to the state as sovereign. Where the activity, however, "is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization," the application of the exemption requires a more searching analysis. *Hoover* v. *Ronwin*, — U.S. —, 104 S.Ct. 1989, 1995 (1984). In these cases, the Court has required a showing that the challenged restraint is "one clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). *See also, City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978); *Community Communications Co., Inc.* v. *City of Boulder*, 455 U.S. 40, 54 (1982). The Court has also considered the degree to which the state "actively supervises" the policy. *Midcal Aluminum*, at 105; *New Motor Vehicle Bd.* v. *Orrin W. Fox*

Co., 439 U.S. 96, 110 (1978). Thus, a state law authorizing wine suppliers to establish and enforce resale prices is not exempt if the state fails to exercise active supervision over the arrangements. *Midcal Aluminum.*

B. Municipal Immunity.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Court held that Congress did not intend to exempt cities from the antitrust laws merely because of their status as political subdivisions of the states. At issue was a challenge to the practices of utilities owned and operated by two cities. Justice Brennan, writing for a plurality, held that only municipal actions "pursuant to state policy to displace competition with regulation or monopoly public service" would be entitled to the exemption. 435 U.S. at 413. The Chief Justice, in a separate opinion, concurred with the plurality's holding that the activities under challenge were exempt only if they were the result of a state policy to displace competition. The Chief Justice reasoned, however, that such authorization was required because the cities were engaging in proprietary activities, implying that nonproprietary activities would be immune from antitrust attack without an inquiry into state policy. 435 U.S. at 423-26.

The split decision in *Lafayette* produced no little confusion among lower courts.[5] Some of the questions raised in Lafayette were settled by the Court's decision in *Community Communications Co., Inc.* v. *City of Boulder*, 455 U.S. 40 (1982). In that case, the plaintiff challenged a three-month emergency ordinance imposing a moratorium on the extension of cable television services in Boulder. The City claimed that

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[5] "Of late the state action doctrine has become a road well-traveled by the Court. Its signposts, however, remain less than clear." *First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984). *See also Hybud Equipment Corp.* v. *City of Akron*, 654 F.2d 1187, 1195 (6th Cir. 1981) ("It is difficult for us to apply the *Lafayette* decision since the plurality and dissenting opinions are each supported by four justices, and no line of reasoning commands a majority of the Court.").

the moratorium was a proper exercise of its home-rule powers. Justice Brennan, writing for a majority, affirmed *Lafayette's* holding that cities are not automatically immune from antitrust liability. The Court, moreover, rejected the City's argument that its actions were protected as an exercise of state sovereign power delegated to the City. For purposes of the *Parker* exemption, sovereignty is exclusively reserved to the state and cannot be transferred to a political subdivision. Municipalities, the Court held, "could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy." *Id.* at 54.

The City of Boulder maintained, in the alternative, that its actions were immune because the grant of home-rule powers by the state constitution met the requirement of "clear articulation and affirmative expression." This grant of authority, the City contended, demonstrated that the legislature "contemplated the kind of action" that was under attack. Again, the Court squarely rejected the City's position. The Court characterized the state's position as one of "mere neutrality." "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.* at 55. Accepting a general grant of legislative authority as a mandate for specific anticompetitive measures, the Court held, "would eviscerate the concepts of 'clear articulation and affirmative expression.'" *Id.* at 56.

The *Boulder* decision clarified the basis of municipal immunity. Whether a city is entitled to the *Parker* exempton depends not upon the proprietary character of the city's actions or whether the action is within the general powers delegated to the city by the state. Immunity would attach only if the measures were taken pursuant to a "clearly articulated and affirmatively expressed" state policy. Left unresolved, however, were related issues of critical importance. The Court reserved the question of whether a city's actions must also

satisfy the test of "active state supervision."[6] Further, although it is clear that home-rule powers alone are insufficient, the Court did not describe what degree of specific statutory authorization is necessary to invoke the exemption.[7]

C. Immunity for State Agencies.

The plurality in *Lafayette* stressed that an exacting standard for municipalities was necessary to maintain economic order within a state and avoid a multitude of conflicts with national policy. "Serious economic dislocation" could result if each city were free to pursue its own parochial interests. 435 U.S. at 412-13. This emphasis on economic atomization within a state suggests that a different standard might apply to agencies with state-wide jurisdiction.[8] Arguably, an agency with state-wide powers, especially if it has authority to make policy, should not be required to show that its conduct was "pursuant to an affirmatively expressed and clearly articulated policy" to displace competition.

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[6] "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*." *City of Boulder*, 455 U.S. at 51 n.14.

[7] The Boulder decision could have a sweeping impact on the assertion of legislative authority by municipalities. Thirty-five states have made provisions for home-rule powers either through legislation or through their constitutions. Note, *Community Communications Co.* v. *City of Boulder*, 31 De Paul L. Rev. 819, 821 (1982).

[8] Although the *Lafayette* requirement of state authorization clearly applies to cities and other subordinate local units, its application to state agencies is uncertain. On the one hand, the majority's belief that "authorization" helps ensure that governmental activity is truly *state* action could logically be extended to state executive departments and administrative agencies. On the other hand, Justice Brennan's reasoning was predicated on the existence of a large number of municipalities and other subordinate governmental units, each pursuing parochial and perhaps conflicting policies. Their ordinances are locally formulated, with a possible anticompetitive impact beyond city or district limits . . . State agencies, by contrast, formulate statewide rules and policies.

Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 444 (1981).

The Supreme Court discussed the standard applied to agencies in the recent case of *Hoover* v. *Ronwin*, — U.S. —, 104 S.Ct. 1989 (1984). There, the Court considered an antitrust attack on the grading of bar examinations by the Arizona Supreme Court's Committee on Examinations and Admissions. In a four-to-three decision, the Court held that the actions of the Committee were, for purposes of the exemption, those of the "state acting as sovereign." The Court's decision turned on the special relationship between the committee and the state supreme court. The state supreme court "retained strict supervisory power over the committee and ultimate full authority over its actions." *Id.* at 1997. Although the committee administered and graded the examinations, the "court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona." *Id.* at 1998. Where such provisions are absent, the challenged action cannot be attributed to the actions of the state as sovereign and the agency must satisfy the standard applied to municipalities. "[T]he anticompetitive conduct of a nonsovereign state representative . . . require[s] a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation." *Id.* at 1995. The Court limited "sovereignty" to the state legislature and supreme court. The Court did not reach, however, the question of whether such sovereign authority may be attributed to the governor of a state. *Id.* at 1995 n.17.

In the case at bar, the parties do not contend that OWDA is so closely related to a sovereign body that the actions of the agency may be attributed directly to the state as sovereign. Thus, OWDA's actions are protected by the exemption only if taken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition. With that standard in mind, we turn to consider the district court's precise holding in the instant case.

III.

A. The District Court's Decision.

On remand, the district court held that the statutes governing the OWDA demonstrated a "clearly articulated and affirmatively expressed state policy" to displace competition. The court found that "the cooperative agreement and ordinance in the present case were clearly 'comprehended within the powers granted' by the state legislature" to OWDA. The state legislature's intent to displace competition was evinced by OWDA's authority "to finance waste disposal facilities and to enter into agreements to safeguard the financial interests of the respective governmental agencies." These provisions, the court held, provided a sufficient basis for the exemption; therefore, the court did not consider whether Akron's power under state law to regulate sanitation and waste disposal would satisfy the requirements for the exemption.

The OWDA was created to "provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state . . . through efficient and proper methods" of solid waste disposal. Ohio Rev. Code § 6123.03. To this end, OWDA is authorized to finance solid waste facilities through revenue bonds to pay for the costs of such projects. The district court noted the following powers and duties of the OWDA:

> For the purposes of Chapter 6123. of the Revised Code, the Ohio water development authority may:
>
> . . .
>
> (C) Make loans and grants to governmental agencies for the acquisition or construction of development projects by any such governmental agency and adopt rules and procedures for making such loans and grants:
>
> . . .
>
> (F) Issue development revenue bonds and notes and development revenue refunding bonds of the state, pay-

> able solely from revenues as provided in section 6123.06 of the Revised Code, unless the bonds be refunded by refunding bonds, for the purpose of paying any part of the cost of one or more development projects or parts thereof;
>
> . . .
>
> (I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. . . .
>
> . . .
>
> (P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code.

Ohio Rev. Code § 6123.04. The OWDA may also contract with government agencies and private persons to fix the terms and conditions for the use or service of a facility financed by OWDA. The statute provides:

> Any government agency or combination thereof may cooperate with the authority in the acquisition or construction of a development project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, . . . including, without limitation, . . . contracting for the operation, leasing, or subleasing for such terms and with such person or governmental agency as maybe agreed upon . . . . The authority shall not enter into such a cooperative agreement with any governmental agency if the authority determines that the project to be acquired or constructed under the agreement would undermine the financial feasibility of an existing development project acquired or constructed under a cooperative agreement between the authority and another governmental agency because the

> proposed project would serve substantially the same geographic area as the existing project . . . .

Ohio Rev. Code § 6123.13.

The district court found it "unquestionable" that the legislature contemplated the "use of anti-competitive measures to ensure the financial viability of its waste disposal facilities." The court determined that OWDA's general authority to carry out powers expressly granted, that the agency's duty to protect its financial interests in development projects, and that the prohibition on the financing of facilities competing with existing projects demonstrated a clearly articulated and affirmatively expressed state policy to displace competition with regulation.

The district court relied on *Boulder* as authority for its holding that the ordinance and agreement under challenge were "clearly comprehended" within the powers granted OWDA. In *Boulder* the Court held that "the term 'granted' necessarily implies an affirmative addressing of the subject by the State." 455 U.S. at 55. In *Boulder*, there was no specific grant of authority to regulate cable television from the state legislature; the city merely claimed the power under Colorado's Home Rule Amendment. By contrast, in the instant case there was a specific grant of power by the state to OWDA to operate in the area of waste disposal and recovery. This grant of authority, the district court ruled, satisfied the requirement that the challenged anticompetitive action result from a state policy.

B. Analysis.

The validity of the district court's finding that OWDA's statutory mandate met the standard of a clearly articulated and affirmatively expressed state policy turns on a crucial ambiguity in *Lafayette* and *Boulder*. In those decisions the Court left unclear the degree of specificity in state law necessary to sat-

isfy the standard applied to a nonsovereign state representative.[9] A municipality, the plurality held in *Lafayette*, is not necessarily required "to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense." However, there must be evidence that the state "authorized or directed a given municipality to act as it did." 435 U.S. at 414. It is clear, however, that merely having the legal authority to engage in the challenged activities is insufficient. The municipalities in *Lafayette* were authorized by state law to own and operate utilities, but this power standing alone did not protect the allegedly anticompetitive actions of those utilities. Likewise, the City of Boulder was empowered under state home-rule provisions to take the actions that were attacked under the antitrust laws. The city's power "to do as [it] please[s]," however, demonstrated only a "neutral" state policy regarding the ways and means that the city chose to exert its power. 455 U.S. at 55.

OWDA's authority to engage in the actions under challenge is somewhere in between a specific state directive and a general, "neutral" grant of powers. Although OWDA may have the power to enter into the agreement now in issue, the statute clearly does not express a state preference for regulation – or monopolistic control – of waste disposal. OWDA's existence

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[9] We noted this problem in *Gambrel* v. *Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1198 (1983).

> Because we believe the meaning of the statute in this case is clear and unambiguous, we need not decide a more subtle question, namely whether the interpretation of an ambiguous or open-ended regulatory statute by a state agency can ever constitute "state action" in and of itself under the *Parker* v. *Brown* doctrine. Certainly the first part of the *Midcal Aluminum* test, whether the challenged restraint is "clearly articulated and affirmatively expressed as state policy," at a minimum covers state policy explicitly declared in a statute. However, state regulatory statutes are often drafted in general terms and delegate broad policymaking discretion to a state regulatory agency. The result is administrative policymaking, either by authorized rulemaking or by enforcement practices.

689 F.2d at 619 n.3.

and function are perfectly consistent with a regime of open and free competition among private businesses that engage in waste disposal. Nothing in the statute declares a state policy regarding the organization of municipal waste disposal systems. As to the type of projects OWDA may finance – whether the projects monopolize or merely compete with private industry – the statute is silent. On the other hand, OWDA is authorized to promote the development of "safe and proper" waste disposal projects. To finance such developments, the agency is empowered to enter agreements "necessary or incidental" to the performance of its duties.

There is no question that a restraint which is expressly set forth in a legislative scheme for regulation is one that reflects a state policy to displace competition. *See, e.g., California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum*, 445 U.S. 97 (1980).[10] Where the restraint is not so expressed but is imposed by a nonsovereign state representative as an exercise of delegated powers, the court must examine the relationship between the restraint and the regulatory aims of the state. If the challenged actions bear an attenuated relationship to the statutory aims and the express powers so delegated, the actions cannot be deemed to have resulted from a clearly articulated and affirmatively expressed state policy to displace competition. For example, public regulation of utilities is justified as necessary to protect consumers from exploitation by a natural monopoly. This justification, however, will not support regulation that reaches beyond the scope of a natural monopoly's powers into competitive markets. Absent express

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[10] For example, in *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376, 383 (7th Cir. 1983), *cert granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1832), the court upheld the exemption for a municipality that conditioned extension of sewer service on annexation. A state statute expressly provided that extension of sewer services could be refused if an adjoining area elected not be become annexed. In *Gambrel* v. *Kentucky Bd. of Dentistry*, 689 F.2d 612, 619 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1198 (1983), this court applied the exemption to protect a restraint on denture products where the challenged conduct was "compelled by the statute itself."

legistative direction for such a restraint, the regulation is not protected as state action under *Parker*. *Cantor* v. *Detroit Edison*, 428 U.S. 579 (1976).[11]

If the challenged anticompetitive restraint of a nonsovereign state representative, for which there is no express statutory provision, is necessary to carry out the representative's mandate, then a legislative intent to displace competition may be inferred from the legislature's delegation of authority. In *Corey* v. *Look*, 641 F.2d 32 (1st Cir. 1981), the plaintiff, a parking lot operator, brought an antitrust suit against a municipality and a public steamship authority. The plaintiff claimed that the town and authority had conspired to drive the plaintiff out of business in an effort to monopolize the market. The First Circuit held that the government bodies must demonstrate "by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative scheme that the state as sovereign had established." This test was not satisfied by a showing that the authority was permitted, under state law, to purchase and operate parking lots. The law "simply empowers the Authority to behave as an ordinary competitive economic agent; we see no necessary anticompetitive implication." *Id.* at 37.

Requiring a showing of a necessary relationship, as in *Corey* v. *Look*, may place, in some circumstances, an unduly heavy burden on the state agency. An agency vested with broad discretionary powers will rarely find that only one course of action is available to accomplish its mission. Courts, moreover, are ill-equipped to determine in many cases whether a restraint was necessary in the strict sense implied by the court in *Corey* v. *Look*. Indeed, that decision may be explained on the grounds that the challenged actions — monopolization of parking lots — bore a tenuous relationship to the central mis-

[11] Similarly, state law authorizing a medical society to investigate charges of willful overcharging by physicians will not extend to justify society's efforts to enforce price-fixing. *Ratino* v. *Medical Service of Dist. of Columbia*, 718 F.2d 1260, 1268 (4th Cir. 1983).

sion of the steamship authority. The Supreme Court, moreover, has not required a showing of necessity, holding that an adequate expression of state policy may be found in "the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Lafayette*, 435 U.S. at 415.[12]

Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of an agency's authority.[13] If the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a "clearly and affirmatively expressed state policy" to displace competition.[14]

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[12] "[T]he state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made." *Princeton Community Phone Book, Inc.* v. *Bate*, 582 F.2d 706, 717 (3rd Cir.), *cert. denied*, 439 U.S. 966 (1978).

[13] Professor Areeda, in an article prior to *Boulder*, writes:

> *Lafayette* does not require that governmental acts be "compelled" or supervised by the state. Rather, it demands that the legislature have authorized the challenged activity with an intent to displace the antitrust laws. Unfortunately, state statutes seldom speak with clarity on either matter. In practice, therefore, express statements of authority or intent cannot be required. The Supreme Court has found it sufficient that "the legislature contemplated the kind of action complained of." A policy to displace the antitrust laws will then be inferred if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity.

Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 445-46 (1981). *See also* P. Areeda, Antitrust Law, ¶ 212.3 (Supp. 1981).

[14] Several courts have adopted this approach. In *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138), the court considered a challenge to a city's decision to grant a contract for exclusive ambulance services within the city to a single operator. The court held that a "sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." State law permitted the city to contract with "one or more" ambulance operators. The court held that the city's actions were protected by the

Unlike the general guarantee of legislative autonomy in *Boulder*, OWDA's powers are expressly limited to the promotion of safe waste disposal systems. OWDA's exercise of this power, however, is restricted to the financing of waste treatment projects; it has no independent regulatory authority. The agency could not enforce the restrictive agreement now under challenge without the regulatory power of the City of Akron. Thus, OWDA's participation in a private scheme to monopolize a waste disposal market would not be entitled to the *Parker* exemption.

Although we cannot agree with the district court that the statutes governing OWDA meet the requirement of a clear and affirmative state policy, we find that the standard is satisfied by other considerations. OWDA's statutory mandate expressly provides that the agency may contract with other government agencies, including municipalities, to carry out state policy.[15] Under Ohio law, municipalities are expressly authorized to regulate the disposal of waste and construct facilities for the disposal of waste.[16] This authority is granted by statute and

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exemption because monopoly service is "the necessary consequence of having only one municipal ambulance operator." 705 F.2d at 1013. *Accord First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439, 1454 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984). *See also Benson* v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272 9th Cir. 1982) (anticompetitive restraints contemplated by statutes creating a licensing board to regulate the practice of dentistry); *Euster* v. *Eagle Downs Racing Ass'n*, 677 F.2d 992, 995 (3rd Cir.), *cert. denied*, 450 U.S. 1022 (1982) (imposition of a fee on jockeys by public agency is necessary to accomplish legislative goals of regulation of horse racing.).

15 OWDA is expressly authorized to enter into cooperative agreements with government agencies for the financing of development projects. The term 'government agency' includes any county, town, or municipality of the state. Ohio Rev. Code Ann. § 6123.01(A).

16 Ohio Rev. Code Ann. § 715.43 provides:

> Any municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof.

Ohio Rev. Code Ann. § 717.01 provides:

not merely claimed by virtue of constitutional home-rule powers as in *Boulder*. The Ohio courts, as the district court noted in its first decision in this suit, have held that a municipality may exercise this power through a monopoly. *See State ex rel. Moock* v. *Cincinnati*, 120 Ohio St. 500, 166 N.E. 583 (1929); *City of Canton* v. *Van Voorhis*, 61 Ohio App. 419, 22 N.E.2d 651 (1939).

We find that the ordinance and agreement under challenge bear a reasonable relationship to the state policy promoted by OWDA and the express powers delegated to OWDA and Akron. The ordinance is limited in scope to the collection and disposal of solid waste, and its promulgation was an essential element of a plan to carry out OWDA's statutory mandate. OWDA's reliance on the statutory authority of a municipality to regulate – even by monopoly – the disposal of refuse was a foreseeable result of the legislative grant of power to contract with municipalities. We hold, therefore, that the statutory delegation of regulatory power to the City conjoined with the powers and aims of OWDA satisfy the requirement that the challenged actions result from a clearly articulated and affirmatively stated policy to displace competition.

Our holding is consistent with that of the Seventh Circuit in *Central Iowa Refuse Systems, Inc.* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3441 (U.S. Nov. 18, 1983) (No. 83-825), a case strikingly similar to the one now before us. In that case, several municipalities joined together to establish an agency, "Metro," to issue revenue bonds for the construction of a modern waste disposal facility. On the recommendation of a bond consultant, the municipalities covenanted for the benefit of bond holders that all waste generated within their jurisdictions would be processed at the facility. An operator of a sanitary landfill outside the jurisdiction of the new plant brought

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Each municipal corporation may:
(C) Erect a crematory or provide other means for disposing of garbage or refuse, and erect public comfort stations . . . .

suit, alleging that the cities had attempted to illegally monopolize the market for waste disposal. The court held that the restriction was protected by the state action exemption.

The court noted that, while statutes authorized the creation of agencies such as Metro, no statute indicated that the state legislature actually contemplated that a facility financed by such an agency would have an exclusive right to dispose of waste. *Id.* at 426. However, the court found authorization for the restriction in the broad authority granted such agencies by the state legislature.

> We believe that the Iowa legislature did indeed contemplate these restrictions on competition. [A statutory provision] expressly authorizes municipalities to finance collective projects by issuing revenue bonds. When ascertaining what was in the minds of the legislators, we cannot ignore the realities of the municipal bond market in the mid-1970s. . . . Common sense and experience suggest that the Iowa legislature must have intended Metro to have the latitude necessary to promote the sale of the bonds. . . . In short, even though the legislation does not speak to the precise question whether restraints of trade could be employed to guarantee the financial vitality of Metro, the comprehensive legislative scheme favoring the development of solid waste facilities demonstrates that the legislature intended the localities to have broad authority to act in furtherance of the legislative mandate. Thus, we believe that the restraint on competition was a "necessary or reasonable consequence" of engaging in the authorized activity of constructing a waste disposal facility with funds raised by revenue bonds.

715 F.2d at 427. The court distinguished the case from *Boulder*. The Iowa legislature had provided that municipalities could join together to create agencies such as Metro. Such an agency could satisfy a municipality's duty to provide sanitary facilities for the disposal of solid waste. By contrast, in *Boulder* there was no reference in state law to the types of in-

dustry to be regulated under Colorado's home-rule provision.

We agree with the reasoning in *Central Iowa Refuse Systems, Inc.*, that a state's broad authorization for the financing of waste facilities is not a "neutral" grant of powers as in *Boulder*. Where, as in the instant case, there is a reasonable exercise of that authorization within a municipality's statutory power to regulate waste disposal, we are satisfied that the restraint is pursuant to the clear articulation and affirmtive expression of state policy required by precedent.

C. Active State Supervision.

As noted earlier, the Supreme Court has not yet determined whether a municipal ordinance that satisfies the criterion of "clear articulation and affirmative expression" must also meet the requirement of active state supervision to be entitled to the state action exemption. *See Boulder*, 455 U.S. at 51 n.14. The several circuits that have considered this issue have held that active state supervision is not necessary where the challenged activity is within a traditional function of a municipality. *See Golden State Transit Corp.* v. *City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984); *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138); *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1832).

The requirement of active state supervision had its greatest force in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In that case, a state statute authorized wine wholesalers to file price schedules, and retailers were required to comply with those prices. These price controls were clearly imposed by state law, but the state exercised no control or supervision over the system. Although the restraints resulted from an undeniable state policy to displace competition, the Court held that the activities were not

protected by the exemption because of the absence of active state supervision over the regulatory scheme.

The fact that the price restraints at issue in *Midcal* were established by private parties lead some courts and commentators to conclude that the requirement of active state supervision was limited to the activities of private parties.[17] In *Midcal* the Court seemed primarily concerned with the risks of private abuse of state-created regulatory schemes.[18] This danger is diminished where the challenged activities are undertaken by state agencies that are not tempted by private gain. Requiring active state supervision may also undermine the traditional functions of self-governing municipalities. Imposing such a requirement on municipalities, one court declared, "would erode the concept of local autonomy and home rule authority." *Town of Hallie* v. *City of Eau Claire*, 700 F.2d at 384.

While there are reasons in logic and in policy for the distinction between state and private actors, there is slight support for such a position in the opinions of the Supreme Court. In its most recent discussion of the requirement, *Hoover* v. *Ronwin*, the Court made no distinction between state and private actors, referring only to the activities of a "nonsovereign state representative." The Court stated that the "degree to which the state legislature or supreme court supervises its representative is relevant" to a determination of whether the conduct is protected by the *Parker* exemption. 104 S.Ct. at

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[17] *See Central Iowa Refuse Sys.* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 428 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3441 (U.S. Nov. 18, 1983) (No. 83-825); *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1852). *See also* Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 445 (1981); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305, 340-42.

[18] In *Midcal* the Court concluded: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what it essentially a private price-fixing arrangement." 445 U.S. at 106.

1995. In *Bates* v. *State Bar of Arizona*, the Court noted that the restraint under attack was subject to pointed reexamination by the state supreme court, a fact that the Court characterized as active state supervision. 433 U.S. at 362.

The Court in *Hoover* v. *Ronwin* mentions supervision by the state legislature or supreme court. Yet, where the inquiry is relevant, it would be extremely impractical to limit "active state supervision" to the oversight by those bodies. By necessity, actual supervision must be delegated to subordinate officials. In Parker, the price support system was administered by the state's director of agriculture and a commission appointed by the governor. In *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), the Court applied the exemption to protect a state's automobile franchise act from a challenge under the antitrust laws. The law permitted existing franchisees to block the establishment of new competitors merely by filing a complaint with a state board, which would permit entry thereafter upon a showing of good cause. The act itself was a system of regulation clearly designed to displace competition. The interim restraints imposed by the objections of existing franchisees, the Court noted, were subject to the board's "ongoing regulatory supervision." 439 U.S. at 110.

We believe that it is unnecessary and inappropriate in this case to establish strict rules setting forth the circumstances requiring rigorous application of the test of state supervision. Where a suit challenges the particular exercise of state power, the court should consider the nature and extent of supervision by the state as part of the general inquiry into whether the challenged actions are those of the state as sovereign. *See Hoover* v. *Ronwin*. The court should give close scrutiny to the existence of supervision where the circumstances indicate the possibility of an improper exercise of that power. *See New Motor Vehicle Bd.; Midcal Aluminum.*

We find that the participation of OWDA in the agreement and in the continued operation of the RES satisfies the con-

cerns underlying the test of active state supervision. OWDA's participation in the agreement insures that the exclusive rights granted the facility were designed to meet the legislative goals set forth in OWDA's mandate. As the district court noted, the cooperative agreement requires periodic reporting to OWDA and authorizes the agency to assume operating responsibility for the RES should the City fail to meet its obligations under the agreement. OWDA's interest and duty to protect the bond owners is an important safeguard against the abuses that motivated the decision in *Midcal*.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

MERRITT, Circuit Judge, concurring. I agree with the Court's holding and its reasoning in this case in full: the financing authority for solid waste projects expressly granted to the Ohio Water Development Agency, when joined with the city's expressly granted authority to regulate garbage disposal, establishes a clearly expressed state policy permitting a municipal monopoly over garbage disposal. I agree also that the state supervision requirement is met by the Water Development Agency's authority to enforce its contract with the city requiring the displacement of competition.

In addition, it seems to me that the city's powers, standing alone, are sufficient to satisfy the state action exemption. The State Legislature in Ohio has expressly granted to the city the authority to "regulate" garbage disposal, including the authority to "establish" and "maintain" garbage disposal plants. The Legislature has delegated to the chief legislative body of the city the power to set policy on waste disposal and to oversee the implementation of that policy. The Legislature gives the city both the power to go into the garbage disposal business itself and the power to control competitors by law – hence the power to monopolize. This state delegation to the local legislative body of the power to monopolize and the power to implement and oversee the operation of the monopoly is sufficient to satisfy the "active state supervision" aspect of the state action test as well as the state delegation aspect.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3306

HYBUD EQUIPMENT CORPORATION, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF AKRON, OHIO, *et al.*,
Defendants-Appellees.

FILED
August 24, 1984
JOHN P. HEHMAN
Clerk

Before: MERRITT AND MARTIN, Circuit Judges; and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Clerk

A True Copy.

Attest:

Deputy Clerk

Issued as Mandate: September 17, 1984

COSTS: (Awarded to appellees)

Filing Fee	$ None
Printing	$ 130.90
Total	$ 130.90

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Nos. C78-1733A, C78-65A

HYBUD EQUIPMENT CORP., *et al.*,

Plaintiffs,

V.

CITY OF AKRON, *et al.*,

Defendants.

FILED
1983 April - 6
PM 2:58

Judge John M. Manos

MEMORANDUM OF OPINION

On February 15, 1978, plaintiffs, Glenwillow Landfill, Inc., Waldo A. Sober, Jr., J.R. Hawley Sanitation, Inc., and G.G. Kovach, filed a complaint against the City of Akron, Summit County, the Ohio Water Development Authority (OWDA), and eighteen individuals.[1] On December 22, 1978, plaintiffs, Hybud Equipment Corp. and Budoff Iron & Metal Company, Inc., filed a separate complaint against the same defendants.[2] In their complaints, plaintiffs sought relief from an ordinance enacted by the City of Akron that requires all solid waste

[1]The individual defendants are Akron's mayor, public service director, and city council members, and the commissioners of Summit County.

[2]On January 29, 1979, The Honorable Leroy J. Contie, Jr., issued an order consolidating these two cases.

collected within the city limits to be brought to the city's Recycle Energy System (RES). Plaintiffs alleged that the ordinance was illegal because it deprived them of due process of law, took property in violation of the Fifth and Fourteenth Amendments, restrained interstate commerce in violation of Article I, Section 8, of the United States Constitution, violated Article 18, Section 3, of the Ohio Constitution, and violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Following a bench trial, the district court granted judgment for the defendants. *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979). Plaintiffs appealed, and on July 17, 1981, the Sixth Circuit Court of Appeals affirmed the ruling of the district court. *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981). Plaintiffs then filed a petition for writ of certiorari with the United States Supreme Court. On February 22, 1982, the Supreme Court granted their petition, vacated the judgment of the Sixth Circuit and remanded the case "for further consideration in light of *Community Communications Co., Inc. v. City of Boulder, Colorado*, 455 U.S. 40, 102 S. Ct. 835, 70 L.Ed.2d 810 (1982)." *Hybud Equipment Corp. v. City of Akron*, 455 U.S. 931, 931, 102 S. Ct. 1416, 1416-17 (1982). On April 19, 1982, the Sixth Circuit remanded the case to this court.[3] The mandate of the Sixth Circuit provides in pertinent part:

> After considering our opinion in light of the Supreme Court's decision in the *City of Boulder* case, the Court remands the case to the District Court with instructions for the District Court to reconsider plaintiff's claims under the Sherman Antitrust Act. No reconsideration of the plaintiff's claims under the Due Process Clause or the Just Compensation Clause or the Commerce Clause is necessary. The District Court should consider in light of the *City of Boulder* case the question whether the state action exemption to antitrust liability applies in this case. The

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[3]On July 2, 1982, Judge Contie issued an order directing the Clerk to reassign this case to another judge.

> District Court should consider that question anew in light of the Supreme Court's recent opinion. It should permit the parties to offer evidence relevant to the determination of that issue. If on remand the District Court should determine that the state action exemption does not apply, then the District Court should go further and determine on the merits the antitrust issues presented.

Accordingly, pursuant to mandate of the Sixth Circuit Court of Appeals and for the reasons that follow, this court finds that the state action exemption to antitrust liability applies to defendants' actions in this case.

I. FACTS

The following findings of fact relevant to the state action antitrust exemption are taken from the Memorandum of Opinion and Order issued by Judge Contie on December 19, 1979. The parties have stipulated to all of the facts that appear below, with the exception of the last two paragraphs.[4]

A. Emergence of the Akron-Summit County Solid Waste Disposal Problem and Genesis of the Recycle Energy System (RES)

5. In the late 1960's, it became apparent that the Akron-Summit County area would soon be facing a serious waste disposal problem, principally triggered by two factors:

> (1) The solid waste disposal regulations (effective July 1, 1968) adopted by the Public Health Council (now EPA) pursuant to the Ohio Waste Disposal Act (Chapter 3734, Ohio Revised Code) outlawed the open dumps being oper-

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[4] *See Glenwillow Landfill Inc. v. City of Akron*, 485 F. Supp. at 674. Paragraphs 5 and 7 are taken from Appendix C, which contains stipulations that were entered into at trial. 485 F. Supp. at 693. Paragraphs 24, 29, 30, 32, 33, 34, 38, 40, 41, 43, 45, and 47 are taken from Appendix A, which contains pre-trial stipulations. 485 F. Supp. at 687-92. Paragraphs 1 and 2 are taken from the main portion of the district court opinion and constitute additional findings of fact.

ated in the County and placed substantial constraints on future location and operation of waste disposal sites.

(2) The Cuyahoga Street landfill, then the only sanitary landfill in the County, was fast filling up, a condition exacerbated by the increasing quantities of solid waste attracted to the landfill by dump closings.

7. In response to the solid waste problem, the City's Department of Planning and Urban Renewal ("Planning Department") undertook, in early 1968, a comprehensive study to find a long-term solution to the problem. The Planning Department considered a number of alternative means to effect a long-term solution to the problem including sanitary landfill, transfer stations, incineration, composting, rail haul to strip mines, etc. Part 1 of this study, dated August, 1968, was devoted to sanitary landfills. In preparing this study, City employees inventoried existing disposal facilities both within and outside of Summit County which they determined to be inadequate. They also studied 102 potential landfill sites within Summit County, but determined that only 7 of these sites, all located in the southern part of the County, were feasible for landfill development from a physical-topographical standpoint.

24. In February, 1969, the City appropriated $22,000 to hire Glaus, Pyle & Schomer to undertake a "Study Of The Methods And Feasibility Of Incineration For Waste Disposal" including "[a]nalysis of waste heat recovery possibilities and consideration of waste heat recovery to offset expenses." Glaus, Pyle concluded that the technology for constructing and operating a "Recycle Energy System" (RES) to convert solid waste to steam or electricity was available but economically unfeasible at the time. Consequently, the Glaus, Pyle study was shelved in September, 1969.

29. In July, 1971, the Planning Department issued its "Comprehensive Regional Waste Disposal Study." The report summarized existing solid waste disposal facilities in the County and concluded that they would be filled by 1978. The report

then examined alternative methods for providing a long-term solid waste disposal solution including:

(1) sanitary landfill;

(2) incineration;

(3) composting of solid waste;

(4) rail haul;

(5) size and volume reduction methods (shredding and crushing); and

(6) resource recovery techniques.

In August, 1971, Glaus, Pyle issued its RES report entitled, "Feasibility Study of Solid Waste Reduction and Energy Recovery."

30. In the year following issuance of the Planning Department and Glaus, Pyle reports, the City's administration took the proposed RES project under advisement. In September, 1972, after a visit to the RES steam plant in Hamilton, Ontario, Mayor Ballard indicated support for the RES project. On October 2, Council held a public hearing on the project; on October 17, the City's Health Commission approved and supported the project. In November, Council passed a resolution inviting proposals from engineering firms interested in designing the project. In April, 1973, after considering a number of alternative technologies, Council authorized the administration to retain Glaus, Pyle to design an RES project at a cost not to exceed $710,000.

32. Commencing in March, 1975, the City, its bond counsel and its financial consultant began formulating concrete plans to finance the project by the issuance of revenue bonds. It was recognized that one element of the project's feasibility was its ability to obtain sufficient solid waste of adequate BTU content over the term of the bonds. To provide an assurance of supply, Council authorized the Director of Public Service to contract with "other units of local government and/or private firms for

the deposit of trash and garbage for disposal at the recycle energy system."

33. In mid-1975, the underwriters advised the City that its proposed RES revenue bonds would not be marketable. Consequently, the City asked the Ohio Water Development Authority ("OWDA") to finance the project. OWDA agreed to finance the project at its September 11, 1975 meeting. Construction contracts were immediately awarded to the low bidders subject to obtaining financing for the project. However, in early November, 1975, counsel for OWDA opined that the City could not secure the OWDA's bonds from its general fund, and, therefore, the proposed financing had to be restructured. In the succeeding months, the underwriters unsuccessfully attempted to restructure the financing. In the course of time, the City began looking for new underwriters. In July, 1976, Dillon, Reed & Co. agreed to head a new underwriting team to purchase and resell the OWDA's RES bonds.

34. The new underwriting team substantially restructured the proposed financing in an effort to make the OWDA's bonds for the RES project marketable. Among other things, the underwriters:

> (1) renegotiated the steam contracts with B.F. Goodrich, Akron University and Akron City Hospital to provide stronger long-term guarantees; and
>
> (2) required the creation of a separate $10,000,000 Project Contingency Fund to cover construction cost overruns.

The steam contracts were successfully renegotiated and the City created the $10,000,000 Project Contingency Fund by committing $5,000,000 of its own general obligation money and obtaining the County Commissioner's agreement to commit $5,000,000 of the County's general obligation money to the contingency fund.

B. The Cooperative Agreement and Ordinance

38. On October 4, 1976, Council authorized the City to enter into a Cooperative Agreement with OWDA and the County to finance the the RES facility. On October 14, the Board of County Commissioners authorized the County to execute the Cooperative Agreement by Resolution 1381-76. Section 5.5 of this agreement provides that the City of Akron (hereinafter referred to as the "LGA") covenants with the OWDA for the benefit of the bond holders that:

> "H. The LGA will not establish, construct or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal by the Project and for which the Project has capacity available and which the OWDA determines to be detrimental to the Project, and, further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. The LGA System shall not charge to or collect from the Project any charge for the haulage or disposal of (i) any Solid Waste residue remaining after processing by the Project and (ii) any Solid Waste which is delivered to the Project and which is not suitable for incineration by the Project or resource recovery, and the LGA shall be responsible for the disposal of such Solid Waste.
>
> "I. For the term of this Agreement, the LGA shall require that all collectors and haulers of Solid Waste within the LGA be licensed by the LGA and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the LGA which is acceptable for disposal by the Project to be delivered to the Project for disposal through the Project and require that such haulers and collectors and the LGA pay or cause to be paid the fees and charges imposed

by the LGA for the disposal of Solid Wastes at the Project. The LGA will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the LGA and which is acceptable for disposal by the Project, to be delivered to the Project for disposal through the Project.

* * * * * * * * * *

"O. . . . . The LGA shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the Project at a level which assures an adequate supply of Solid Waste for the purpose of the Project and, subject to the foregoing, shall be comparable with competetive charges for such services. . . ."

Under Section 5.6 of the Cooperative Agreement, the County covenants with OWDA for the benefit of the bond holders that:

"A. The County will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment which OWDA solely determines to be detrimental to the Project of Solid Waste which is acceptable for disposal by the Project and for which the Project has capacity available, and further to the extent legally permissible, it will oppose the establishment, construction or operation of such facilities.

"B. The County will take all legally available action, administrative, judicial and legislative, to cause all Solid Waste generated within the County and which is acceptable for disposal by the Project and for which the Project has capacity available, to be delivered to the Project for disposal through the Project."

40. Counsel for the County states that the County has taken no action to implement its covenants under Section 5.6 of the

Cooperative Agreement. None of the other parties to this suit is aware of any such action by the County.

41. The Cooperative Agreement was signed by the City, the County and OWDA effective December 1, 1976.

43. On October 4, 1976, prior to but in contemplation of and for the purpose of giving effect to the covenants undertaken by the three governmental entities in the Cooperative Agreement, the Council of the City of Akron, Ohio, passed Ordinance No. 841-76 (hereinafter "Ordinance"). This Ordinance, which amends Section 850.06, 1068.06 and 1068.14 of the Codified Ordinances of the City of Akron (hereinafter "Codified Ordinances"), revised licensing requirements and service charges with respect to the collection and disposal of garbage and rubbish within the City of Akron. Specifically, Section 1(a) of the Ordinance amends Section 850.06 of the Codified Ordinance as follows:

> "(a) Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the Holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor."

Section 2 of the Ordinance amends Section 1068.06 of the Codified Ordinance as follows:

> "No person, except duly authorized collectors of the City or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of

> the City of the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal."

Section 3 of the Ordinance establishes a collection and disposal fee for garbage and rubbish generated within the City's limits during the calendar year 1978. Section 3 also provides that:

> "[t]he Director of Public Service is authorized to promulgate rules and regulations for the collection of said service charge and he is further authorized with consent of Council to adjust such charge upward on January 1, 1979 or on January 1 of any year thereafter."

45. Collectors and transporters of solid waste in the City presently holding licenses issued by defendant City, including plaintiffs Hawley, Kovach and Hybud, and persons who may in the future apply for and obtain such licenses, shall be required, as a condition of such licenses, after the RES commences operation, to bring to RES all solid waste collected in the City and which the City determines to be acceptable for RES, and to pay RES such fees for disposal there as the City shall establish from time to time. Persons holding such licenses who fail or refuse to comply with said requirements shall be subject to potential loss of such licenses, in which case they will be prohibited from collecting or transporting solid waste in the City of Akron, or they may be subject to criminal prosecution by the City. Parties who collect solid waste within the City without licenses as prescribed by the Ordinance will be subject to criminal prosecution.

47. The Ordinance will prevent plaintiffs Hawley, Kovach and Hybud, or any other persons holding City licenses, from taking solid wastes subject to the Ordinance (i.e. solid waste collected within Akron which is acceptable for disposal at RES)

to private or public disposal facilities outside of the City after RES commences operation, including plaintiffs Glenwillow and Portage.

C. Additional Findings of Facts

1. The city built the RES to solve its solid waste disposal problem. A number of factors, including Ohio Edison's desire to stop generating steam for the downtown business district, caused the city to decide the RES was the best alternative available to solve the waste disposal problem.

2. The underwriters decided it was necessary to assure a supply of waste to the RES in order to market the revenue bonds. After learning this the city and the OWDA concluded that it would be necessary to require that all waste collected within the city limits would be taken to the RES.

II. STATE ACTION ANTITRUST EXEMPTIONS

Pursuant to the mandate of the Sixth Circuit Court of Appeals, this court must first determine whether the state action antitrust exemption applies to the defendants in this case. Only if this court finds that the exemption does *not* apply, will it then be necessary to determine the merits of the antitrust issues presented.

The United States Supreme Court first recognized a state action exemption to antitrust laws in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943). In *Parker*, the Supreme Court held that a California law designed to reduce competition among raisin growers and to provide price supports for raisins did not violate the Sherman Act because the antitrust laws were not meant to cover the actions of a state itself. The Court noted: "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 350, 63 S. Ct. at 313. The Court added: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as

an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352, 63 S. Ct. at 314. In recent years the state action antitrust exemption has received considerable attention from the Supreme Court. *See: Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S. Ct. 835 (1982); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 455 U.S. 97, 100 S. Ct. 937 (1980); *New Motor Vehicle Board of Education v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct. 3110 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975).

In *City of Boulder*, the Supreme Court considered the issue of whether and to what extent the state action antitrust exemption applies to municipalities. The Court, in adopting the plurality opinion of Justice Brennan in *City of Lafayette*, held that the anticompetitive restraints engaged in by state municipalities or subdivisions must be "clearly articulated and affirmatively expressed as state policy" in order to gain an antitrust exemption. In *City of Boulder*, the city argued that its "emergency" ordinance prohibiting the expansion of cable television operations within the city for three months was exempt from Sherman Act liability. The city contended that the state's direct delegation of powers to the city through the Home Rule Amendment to the Colorado Constitution rendered the moratorium ordinance "state action" for purposes of Sherman Act liability. The Supreme Court rejected these arguments and held that the city's ordinance was not exempt from antitrust liability. The Court stated:

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the state's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions

> for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*." since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged, "we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F.2d, at 707.

455 U.S. at 55, 102 S. Ct. at 835. (Emphasis in original). The Court, in explaining what constitutes "clear articulation and affirmative expression," reiterated the standard of the Fifth Circuit that Justice Brennan had expressly adopted in his plurality opinion in *City of Lafayette*. The Court of Appeals described the applicable standard as follows:

> "[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the anti-trust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to act in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, . . . the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct . . . A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent."

City of Boulder, supra, 455 U.S. at 49-50 n. 12, 102 S. Ct. at 840 n. 12 (quoting *City of Lafayette v. Louisiana Power & Light*

Co., 532 F.2d 431, 434-35 (5th Cir. 1976)). *See also City of Lafayette, supra*, 435 U.S. at 415, 98 S. Ct. at 1138.[5]

In his Memorandum of Opinion and Order, Judge Contie held that the challenged activities of the city, county, and water development authority were exempt from antitrust liability for two alternative reasons. First, the ordinance in question was adopted in furtherance of the "clearly articulated and affirmatively expressed" state policies embodied in the statutes governing the OWDA.[6] Second, the home-rule powers given to municipalities under the Ohio Constitution permit local authorities to act as agents of the state.[7] Although the viability of this second ground for antitrust exemption is in doubt after *City of Boulder*,[8] this court need not address that issue, since it

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[5]In his plurality opinion in *City of Lafayette*, Justice Brennan stated the following:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 532 F.2d at 434.

435 U.S. at 415, 98 S. Ct. at 1138 (footnote omited).

[6]485 F. Supp. at 675-77.

[7]485 F. Supp. at 677-78.

[8]Judge Contie explained this second ground for antitrust exemption as follows:

> The home-rule powers given to municipalities under the Ohio Constitution authorize charter cities to establish governmental policy within their corporate limits to the extent that the legislature has not set a uniform state policy. Ohio Const. Art. XVIII, § 3. In other words, in the language of *Bates*, the Ohio Constitution declares that cities act as agents of the state when they exercise governmental powers within their city limits. The Ohio Constitution grants these powers in broad terms, and does not explicitly define the scope of a city's power to regulate competition in the sphere of solid waste disposal. *Rather than declare a state-wide policy to be implemented by state or local authorities, Ohio's waste disposal policy is*

finds sufficient grounds for antitrust exemption within the Ohio statutes governing the OWDA.

Section 6121.02 of the Ohio Revised Code creates the OWDA. The purposes and powers of the OWDA with respect to waste disposal facilities are set out in sections 6123.03 and 6123.04 of the Ohio Revised Code:

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to permit local authorities to declare the policy that will control within their borders. The Ohio courts have recognized that local governments are responsible for regulating the collection and disposal of solid waste within their borders—by monopoly if the city finds it appropriate. See *State ex rel. Moock v. Cincinnati*, 120 Ohio St. 500, 166 N.E. 583 (1929); *City of Canton v. Van Voorhis*, 61 Ohio App. 419, 22 N.E.2d 651 (1939).

. . . In Ohio the state has delegated to local authorities the power to declare the policy that will control within their borders. *The Court does not believe that the state's policy choice is entitled to less weight because it has chosen diversity over homogeneity.* This is particularly true in areas of traditional local concern such as the collection and sanitary disposal of solid waste which is the focus of the challenged ordinance.

485 F. Supp. at 677-78 (emphasis added).

In *City of Boulder*, the Supreme Court held: "[T]he requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting municipal actions challenged as anticompetitive." 455 U.S. at 55, 102 S. Ct. at 843 (emphasis added). It is unclear, however, whether a state's grant of power to municipalities to monopolize the collection and disposal of garbage, *to be exercised at the municipality's discretion*, constitutes a state action antitrust exemption. *See* OHIO REV. CODE ANN. §§ 715.43 and 717.01(C). *See also Town of Hallie v. City of Eau Claire*, No. 82-1715, slip op. at 8-10 (7th Cir. Feb. 17, 1983). *See generally* Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 444-49. Professor Areeda commented:

[D]isregarding home rule might result in a paradox. Given home rule, *a state legislature would not have occasion to enact the particular legislation from which antitrust court might infer delegated power to displace the antitrust laws.* For example, a statute authorizing airport construction and operation might imply immunity for granting an exclusive newsstand or aircraft-servicing concession. *But a home rule provisions obviates a specific statute and eliminates the basis for inferring legislative intent.* To avoid this anomaly, the antitrust court should first decide whether the challenged conduct, such as granting an exclusive concession, is within the power granted by the home rule provision. If so, the court should infer that the legislature or constitution "intended" to displace the antitrust laws if the conduct is a reasonable incident of an authorized activity, such as running an airport.

Id. at 449. (Emphasis added).

§ 6123.03 [Purposes.]

It is hereby declared to be the public policy of the state through the operations of the Ohio water development authority under this chapter to contribute toward one or more of the following: to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid wastes thereby eliminating or decreasing accident and health hazards including rodent and insect vectors of disease, public nuisance and the adverse effect on land values caused thereby and the scenic blight marring the landscape, [and] to assist in the financing of solid waste facilities. . . . In furtherance of such public policy, the Ohio water development authority . . . may make loans and grants to governmental agencies for the acquisition or construction of solid waste facilities by such governmental agencies; . . . and may issue development revenue bonds of this state payable solely from revenues, to pay the cost of such projects. . . .

§ 6123.04 [Powers and duties.]

For the purposes of Chapter 6123. of the Revised Code, the Ohio water development authority may:

• • • •

(C) Make loans and grants to governmental agencies for the acquisition or construction of development projects by any such governmental agency and adopt rules and procedures for making such loans and grants;

• • •

(F) Issue development revenue bonds and notes and development revenue refunding bonds of the state, payable solely from revenues as provided in section 6123.06 of the Revised Code, unless the bonds be refunded by re-

funding bonds, for the purpose of paying any part of the cost of one or more development projects or parts thereof;

• • • •

(I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. . . .

• • • •

(P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code.

In addition, section 6123.13 of the Ohio Revised Code contains some addition provisions that focus upon cooperative agreements between the OWDA and governmental agencies*

§ 6123.13 [Rental agreements.]

The Ohio water development authority may charge, alter, and collect rentals or other charges for the use or services of any development project and contract in the manner provided by this section with one or more persons, one or more governmental agencies, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges for such use or services. . . .

Any governmental agency or combination thereof may cooperate with the authority in the acquisition or construction of a development project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, which agreements shall provide for such contributions by the parties thereto in such proportion as may be agreed

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*The term "government agency" includes any county, town, or municipality of the state. OHIO REV. CODE ANN. § 6123.01(A) (Page Supp. 1981).

> upon and such other terms as may be mutually satisfactory to the parties including, without limitation, the authorization of the construction of the project by one of the parties acting as agent for all of the parties; the ownership and control of the project by the authority to the extent necessary or appropriate for purposes of the issuance of development revenue bonds by the authority; contracting for the operation, leasing, or subleasing for such term and with such person or governmental agency as may be agreed upon; and the sale or other disposition of such project to such governmental agency as may be agreed upon. The authority shall not enter into such a cooperative agreement with any governmental agency if the authority determines that the project to be acquired or constructed under the agreement would undermine the financial feasibility of an existing development project acquired or constructed under a cooperative agreement between the authority and another governmental agency because the proposed project would serve substantially the same geographic area as the existing project. . . .

These statutes indicate that the state legislature granted the OWDA broad authority to finance waste disposal facilities and to covenant with municipalities "with a view to effective cooperative action and *safeguarding of the respective interests of the parties*." OHIO REV. CODE ANN. § 6123.13 (Page Supp. 1981) (emphasis added). That the legislature contemplated the use of anti-competitive measures to ensure the financial viability of its waste disposal facilities is unquestionable. Section 6123.13 of the Ohio Revised Code expressly prohibits the OWDA from financing any competing projects that would "undermine the financial feasibility of an existing development project." In addition to these specific provisions, section 6123.04 of the Ohio Revised Code also authorizes the OWDA to "[m]ake and enter into all contracts and agreements . . . necessary or incidental to the performance of its duties and the execution of its powers" and to do "all acts necessary or proper to carry out the powers expressly granted in Chapter 6123."

OHIO REV. CODE ANN. § 6123.04(I) and (P) (Page Supp. 1981). Clearly, these statutes meet the standard, enunciated by Justice Brennan in *City of Lafayette:*

> that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

435 U.S. at 415, 98 S. Ct. at 1138 (footnote and citations omitted). *Accord, City of Boulder,* 455 U.S. at 49-50 n. 12, 102 S. Ct. at 840 n. 12.

Unlike the cable television ordinance in *City of Boulder,* which was enacted "in the absence of any regulation whatever by the State of Colorado," the cooperative agreement and ordinance in the present case were clearly "comprehended within the powers granted" by the state legislature.[10] The OWDA was created with the express purpose of promoting waste disposal facilities, and more specifically, the state legislature has authorized the OWDA to enter into cooperative agreements with municipalities with a view toward safeguarding the interests of the parties and ensuring the financial feasibility of the facilities it helps fund. OHIO REV. CODE ANN. §§ 6123.03, 6123.04, and 6123.13 (Page Supp. 1981). Thus, since the statutes governing the OWDA clearly demonstrate "that the legislature contemplated the kind of action com-

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[10] In *City of Boulder,* the Court stated:

> Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F.2d, at 707.

455 U.S. at 55, 102 S. Ct. at 843. (Emphasis in original).

plained of," defendants' actions must fall within the state action antitrust exemption.

The finding of "clear articulation and affirmative expression" in the present case comports with the reasoning in at least four post-*Boulder* decisions. *See Town of Hallie v. City of Eau Claire*, No. 82-1715, Slip Op. (7th Cir. Feb. 17, 1983); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982); *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 388 (1982); *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982). In *Town of Hallie*, the Seventh Circuit held that a city's refusal to supply sewage treatment services to neighboring towns that refused to become annexed was exempt from antitrust liability. On the basis of several statutes and court decisions interpreting those statutes the court held that the state had given the city the authority to insist on annexation as a condition to extending sewer services. In *Pueblo Aircraft Service*, the court held that the general statutory language authorizing the city to acquire and operate a municipal airport exempted the city from antitrust liability in its dealing with "fixed base operators" at the airport. In *Euster v. Eagle Downs*, the court held that the broad authority given to the Pennsylvania Horse Racing Commission to supervise generally all thoroughbred horse race meetings exempted from liability a Commission rule setting fees to be paid to jockets. In *Gold Cross Ambulance*, the court held that state statutes setting up a comprehensive system for licensing and regulating ambulance companies exempted from antitrust liability the city's decisions to monopolize ambulance service within the city limits.

The recent opinion of the Seventh Circuit in *Town of Hallie* contains two important preliminary holdings relevant to the case currently before the court. First, the Seventh Circuit held that the proper test was "whether the state gave the City [of Eau Claire] authority to operate in the area of sewage services and to refuse to provide treatment services," not whether the state specifically authorized "the City's use of monopoly power

over sewage treatment to gain monopolies in sewage collection and transportation." Slip Op. at 8. Second, the court held that the city did not have to point to a state policy *compelling* the challenged conduct. The court stated:

> We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

Slip Op. at 9.

The reasoning of the Seventh Circuit can be applied by analogy to the case currently before the court. First, if the state gave the OWDA authority to finance waste disposal facilities and to enter into agreements to safeguard the financial interests of the respective governmental agencies, then the court can assume that the state contemplated that anticompetitive effects might result from conduct pursuant to that authorization. Second, so long as the defendants are acting pursuant to a clearly articulated and affirmatively expressed state policy that evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, or merely authorized—the defendants are exempt from antitrust liability. Under this reasoning, defendants' actions are entitled to state action antitrust immunity. As stated earlier, it was the decision of the OWDA, upon the advice of its underwriters, to insist that the city and county enter into the cooperative agreement and adopt the ordinance in question.[11]

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[11] As Judge Contie stated in his December 19, 1979 Memorandum of Opinion and Order:

> The underwriters were hired by the OWDA to market the bonds. The fact that the OWDA and the city relied in part on the underwriters' expertise in making their decision to support and enact the ordinance does not make it any less their decision.

485 F.Supp. at 677 n.9.

Since these measures were taken to ensure the financial feasibility of the RES, or in the language of the statute, "with a view to effective cooperative action and safeguarding of the respective interests of the parties," they are exempt from antitrust liability.

Plaintiffs also contend that defendants' actions are not exempt from antitrust liability because the state itself does not "actively supervise" the cooperative agreement and ordinance in dispute. *See: City of Boulder*, 455 U.S. at 51-52 n. 14, 102 S. Ct. at 841 n. 14; *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. at 105, 100 S. Ct. at 943; *City of Lafayette*, 435 U.S. at 410, 98 S. Ct. at 1135. In *City of Boulder*, however, the Supreme Court expressly reserved judgment on the applicability of the "active state supervision" test to restraints imposed by municipalities.

> Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the "clear articulation and affirmative expression" criterion, we do not reach the question whether the ordinance *must* or could satisfy the "active state supervision" test focused upon in *Midcal*.

455 U.S. at 51-52 n. 14, 102 S. Ct. at 841 n. 14. (Emphasis added). Moreover, in *Town of Hallie*, the Seventh Circuit specifically held that the "active state supervision" requirement does *not* apply to municipalities engaged in a traditional municipal function. The court stated:

> This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.

> We also conclude that requiring active state supervision over a traditional municipal function would be unwise. A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness. We doubt that the Court in *Midcal* intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability.

Slip Op. at 15-16. *Accord, Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982). *See also City of Boulder, supra*, 455 at 71 n. 6, 102 S. Ct. at 851 n. 6 (Rehnquist, J., dissenting) ("The Court understandably avoids determining whether local ordinances must satisfy the 'active state supervision' prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.").

The court finds the reasoning of the Seventh Circuit in *Town of Hallie* equally applicable to the case currently before the court; however, even if the "active state supervision" test does apply to municipal conduct, the city ordinance would meet that test. The OWDA, a state agency, does in fact supervise both the RES generally and the enforcement of the ordinance specifically pursuant to the terms of the cooperative agreement.[12]

Thus, irrespective of the applicability of the "active state supervision" test to the actions of the defendants in this case, plaintiffs' argument is without merit.

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[12]The cooperative agreement requires periodic reporting to OWDA on the project and authorizes the OWDA to inspect the RES and assume responsibility for operating the RES in the event that the City fails to enforce the agreement's covenants. Defendant OWDA Exhibit Q, at 36, 41.

Accordingly, pursuant to the mandate of the Sixth Circuit Court of Appeals, this court finds that defendants' actions are exempt from antitrust liability.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NOS. C78-1733A, C78-65A

HYBUD EQUIPMENT CORP., *et al.*,

Plaintiffs,

V.

CITY OF AKRON, *et al.*,

Defendants.

FILED
1983 April 6
PM 2:58

Judge John M. Manos

ORDER

Pursuant to the memorandum of Opinion issued in the above-captioned case this date, the Memorandum Opinion and Order of The Honorable Leroy J. Contie, Jr., issued December 19, 1979, is affirmed.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3121

HYBUD EQUIPMENT CORP., *et al.*,

Appellants,

v.

CITY OF AKRON, *et al.*,

Appellees.

FILED
April 19, 1982
JOHN P. HEHMAN
Clerk

Before: MERRITT and MARTIN, Circuit Judges; GORDON, Senior District Judge*

ORDER

The Court has received from the Clerk of the Supreme Court an order dated March 29, 1982, in which the Supreme Court has vacated the previous judgment and opinion of this Court filed July 17, 1981, affirming the District Court. Our opinion is reported, *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981). The Supreme Court has remanded the case to this Court for further consideration in light of its recent decision in *Community Communications Co., Inc. v. City of Boulder, Colorado*, 102 S.Ct. 835 (1982).

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*The Honorable James F. Gordon, Senior District Judge, United States District Court for the Western District of Kentucky, sitting by designation.

After considering our opinion in light of the Supreme Court's decision in the *City of Boulder* case, the Court remands the case to the District Court with instructions for the District Court to reconsider plaintiff's claims under the Sherman Antitrust Act. No reconsideration of the plaintiff's claims under the Due Process Clause or the Just Compensation Clause or the Commerce Clause is necessary. The District Court should consider in light of the *City of Boulder* case the question whether the state action exemption to antitrust liability applies in this case. The District Court should consider that question anew in light of the Supreme Court's recent opinion. It should permit the parties to offer evidence relevent to the determination of that issue. If on remand the District Court should determine that the state action exemption does not apply, then the District Court should go further and determine on the merits the antitrust issues presented.

Accordingly, it is ORDERED that the case be remanded to the District Court for reconsideration in light of the Supreme Court's opinion in *Community Communications, Inc. v. City of Boulder, Colorado*, 102 S.Ct. 835 (1982), and this Court's instructions.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

FEBRUARY 22, 1982

Mr. William C. Brashares
c/o Cladouhos & Brashares
1750 New York Avenue, N.W.
Washington, DC 20006

Re: Hybud Equipment Corp., *et al.*, v. City of Akron, Ohio, *et al.* **No. 81-723**

Dear Mr. Brashares:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. — (1982).

Very truly yours,

Alexander L. Stevas, Clerk

APPENDIX E

No. 80-3121

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HYBUD EQUIPMENT CORP.; BUDOFF IRON & METAL CO.; GLENWILLOW LANDFILL, INC.; WALDO A. SOBER, JR.; J. P. HAWLEY SANITATION, INC.; & G. G. KOVACH,

Plaintiffs-Appellants,

v.

CITY OF AKRON, OHIO; JOHN S. BALLARD; RAY KAPPER; ELSIE REAVEN; JAMES R. WILLIAMS; VINCENT CIRACO; ROBERT GOEHLER; REGINALD BROOKS; KATHLEEN GRIESSING; ROBERT OTTERMAN; MICKEY ERITANO, JR.; JOHN FRANK; DON PLUSQUELLIC; WILLIAM C. GRIMM; ROBERT EDWARDS; COUNTY OF SUMMIT, OHIO; MARK RAVENSCRAFT; TED COLES; DON STEPHENS; OHIO WATER DEVELOPMENT AUTHORITY,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed July 17, 1981.

Before: MERRITT and MARTIN, Circuit Judges; GORDON, Senior District Judge.*

* The Honorable James F. Gordon, Senior District Judge, United States District Court for the Western District of Kentucky, sitting by designation.

MERRITT, Circuit Judge. In the late 1960s, the City of Akron was confronted by the need to develop new sources of energy and to find alternative methods of waste disposal. In an attempt to alleviate both problems, the City decided to construct a $55 million energy recycling plant, a facility that generates energy in the form of steam heat from the incineration of trash.[1] Plaintiff-appellants seek injunctive relief against several actions undertaken by the City and other defendants to guarantee the feasibility of the plant, alleging that those actions violate the federal antitrust laws and the due process, interstate commerce and takings clauses of the Constitution. Underlying the legal issues are related and sometimes conflicting national policies respecting resource and energy conservation, environmental protection and energy production. After reviewing the questions presented, the District Court entered judgment for the defendants on all claims. *Glenwillow Landfill, Inc.* v. *City of Akron*, 485 F.Supp. 671 (N.D. Ohio 1979). The issues presented on appeal are whether the City has violated either federal constitutional provisions or the antitrust laws by adopting a city ordinance monopolizing garbage collection and disposal and eliminating competition in the market for recyclable wastes. We find no federal constitutional or statutory violation and accordingly affirm.

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[1] Municipal efforts in the field of waste recovery and energy recycling have developed dramatically in the last decade. In its March 1981 report, the National Center for Resource Recovery, Inc. listed sixty-three "materials and energy recovery facilities," at various stages of construction or operation, and varying in capital cost from $200,000 to $160 million, located in twenty-six states throughout the nation. Almost all the facilities include a local government entity as a primary participant, and almost all use one or more of several processes to convert deposited solid waste into energy. A smaller number are also equipped to recover recyclable materials, such as ferrous and nonferrous metals and glass, for reuse. The Akron facility that is the focus of the present lawsuit, which was constructed at a cost of $55 million and has a capacity of one thousand tons of waste per day, appears to be among the more ambitious projects.

I. STATEMENT OF THE CASE

A. The Akron Energy Recycling Plant and the Ordinance in Question

In the late 1960s, Akron's solid waste disposal landfills were approaching capacity, and a new landfill operating in violation of EPA standards was immediately challenged in court. In addition, Ohio Edison, which supplied steam heat to businesses in downtown Akron, sought to abandon the Akron market. The City began to search for an alternative energy supply. After a period of study, the City decided to develop the solid waste recycling plant, but the revenue bonds issued to finance the project proved unmarketable. The City turned to the Ohio Water Development Authority, a state agency, for financial assistance. It agreed to finance the project but later discovered that it could not secure the bonds from its general fund.

At this juncture, in 1976, the firm of Dillon, Reed & Co. was hired to study and possibly underwrite the bonds. To improve the marketability of the $46 million bond issue, the underwriters imposed the requirement that an agreement be executed between the Water Authority, Summit County (in which Akron is situated), and the City of Akron. Among the covenants included in the agreement was the requirement that the City enact an ordinance that would guarantee a supply of solid waste for the plant.

This is the ordinance challenged here. It was passed by the City in October 1976. Together the agreement[2] and the

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[2] The pertinent provisions of the cooperative agreement read as follows:

> [The City of Akron] will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal [at the plant] and for which the [plant] has capacity available and which the [Water Authority] determines to be detrimental to the [plant], and, further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. . . .
>
> • • •

ordinance[3] prohibit the establishment of alternative waste disposal sites, require all garbage collectors within the City and County to deposit at the plant all waste "acceptable for disposal" at the facility, and require all collectors to pay a "tipping fee" when they deposit waste at the plant. Collectors violating the ordinance could lose their licenses and be subject

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For the term of this Agreement, the [City] shall require that all collectors and haulers of Solid Waste within the [City] be licensed by the [City] and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the [City] which is acceptable for disposal by the [plant] to be delivered to the [plant] for disposal through the [plant] and require that such haulers and collectors and the [City] pay or cause to be paid the fees and charges imposed by the [City] for the disposal of Solid Wastes at the [plant]. The [City] will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the [City] and which is acceptable for disposal by the project, to be delivered to the [plant] for disposal through the [plant].

• • •

The [City] shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the [plant] at a level which assures an adequate supply of Solid Waste for the purpose of the [plant] and, subject to the foregoing, shall be comparable with competitive charges for such services. . . .

• • •

The County will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment which [the Water Authority] solely determines to be detrimental to the [plant] of Solid Waste which is acceptable for disposal by the [plant] and for which the [plant] has capacity available, and further to the extent legally permissible, it will oppose the establishment, construction or operation of such facilities.

• • •

The County will take all legally available action, administrative, judicial and legislative, to cause all Solid Waste generated within the County and which is acceptable for disposal by the [plant] and for which the [plant] has capacity available, to be delivered to the Project for disposal through the [plant].

[3] The challenged provisions of the ordinance read:

Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant be-

to criminal penalties. These enactments were considered necessary for the financial success of the plant, for the defendants and the underwriters feared that without such restrictions it would be impossible to guarantee a sufficient waste supply from which a steady source of energy for potential customers could be generated. Some materials are not deposited at the plant, such as recyclables presorted at the source that never enter the waste stream, and materials judged unacceptable for disposal at the facility (*e.g.*, hazardous wastes and solid matter that the plant is unequipped to incinerate). The wastes "acceptable for disposal" at the facility consist of two types of solid materials — those that are incinerated to generate steam, and those (primarily ferrous) that cannot be burned but can be recovered and recycled. Some non-metal recyclable materials, such as paper products, which prior to the enactment of the ordinance were separated out and sold by the collectors, now will be incinerated instead to generate steam. Concern over the decision to destroy recyclable paper products caused the American Paper Institute to file an amicus brief challenging the legality of the ordinance.

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gins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor.

• • •

No person, except duly authorized collectors of the City or private haulers licensed pursuant to law shall collect or remove any garbage, or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal.

Another section of the ordinance establishes fees for the collection and disposal of garbage for 1978 and authorizes a City official to promulgate rules on the collection of the fees and, with the Council's consent, to make annual adjustments in the charges.

According to this plan, revenue is earned by the plant in three ways: from the generation and sale of energy, from the tipping fees paid by collectors disposing of waste at the facility, and from the sale of recyclables recovered at the facility. The City has agreed with Teledyne National, the private company that has contracted to operate the plant that Teledyne may retain one-half of the revenues earned from sale of recovered materials.

The plan established in the agreement and ordinance interferes with the previous operations of the plaintiffs, landfill operators and collectors of solid waste in the County. Previously Hybud Equipment Corp. collected waste in the City, charging customers a fee for the service. The waste was hauled to a "transfer station" run by an affiliated company, Budoff Iron & Metal Corp., where recyclable materials were separated out and sold. Hybud paid rebates to its customers from the payments it received from selling the recyclables. The waste that could not be sold was hauled to landfills where Hybud paid a tipping fee to deposit it. Hybud in effect paid customers for the valuable recyclables it received from them while charging them for the service of hauling away nonrecyclable waste. The other plaintiffs are other waste collectors in the City and County and operators of landfill disposal sites that received a significant portion of their income from tipping fees paid by collectors hauling waste originating in the City and the County.

The ordinance and agreement interfere with plaintiffs' businesses in three ways. First, the income of the landfills is substantially reduced because they no longer receive waste (except materials unacceptable at the plant) originating in the City. Second, the collectors are required to haul waste to the plant and pay its fixed tipping fee. This eliminates the competition among waste disposal sites, grants the plant the power to fix tipping fees unrestrained by the forces of a competitive market, and deprives collectors of their former freedom to shop among disposal sites and to patronize those sup-

plying services at minimal combined tipping and transportation costs. Finally, the business of recovering and selling valuable recyclables is removed from collectors such as Hybud. Instead of receiving payments from the sale of the recyclables they collect, haulers are required to deposit them at the plant and pay a tipping fee, as with the nonrecyclable solid waste deposited there. The plant treats the recyclables as it wishes, either burning them to create energy or separating them out and selling them. Either way, the revenue generated from the use of the recyclables is retained by the plant.

Plaintiffs do not challenge the establishment of the plant. The construction of an additional facility to compete in the waste disposal industry, they acknowledge, violates no law. Rather, they challenge the additional actions taken by the defendants to eliminate competition in the industry and to make the plant the sole waste disposal facility in the Akron area. Plaintiffs argue that the economic viability of the plant may not be insured at the price of destroying competition. They seek an injunction prohibiting enforcement of the ordinance and a declaration that the ordinance and other concerted activities among the defendants are illegal. Defendants concede that the agreement and the ordinance were enacted upon the urgings of the project's underwriters in order to guarantee the project's financial success. The defendants as well as the United States Department of Justice in an amicus brief filed on behalf of the Environmental Protection Agency and the Department of Energy argue, however, that the anticompetitive steps taken to make the plant feasible accord with national energy and environmental policy.[4]

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[4] In its amicus brief, the United States has argued that the policies furthered by defendants' actions have been repeatedly addressed by Congress, in, *e.g.*, Energy Policy and Conservation Act, 42 U.S.C. §§ 6201 *passim*; Energy Conservation and Production Act, 42 U.S.C. §§ 6801 *passim*; and Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *passim*.

B. Akron's Authority to Build the Plant and Restrict Competition Under State Law

Akron exercises its municipal powers under a grant of municipal home rule found in Ohio's Constitution. Article XVIII, § 3 reads:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Section 7 of Article XVIII authorizes municipalities to adopt charters for their government and, "subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Ohio case law holds that these state constitutional provisions "pass the sovereign power of municipal government . . . directly from the people of the state to the people of the city" and has the effect of delegating a part of the state's "sovereignty" to the city, *State ex rel. Toledo* v. *Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913), including the power to establish a municipal monopoly for the collection and incineration of garbage. *State ex rel. Moock* v. *Cincinnati*, 120 Ohio St. 500, 166 N.E. 583, *cert. denied*, 280 U.S. 578 (1929).

In addition, Ohio statutes delegate to municipalities the authority to regulate the disposal of garbage. Ohio Rev. Code § 715.43 grants municipalities the authority to "provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof." Similarly, Ohio Rev. Code § 717.01(C) empowers municipalities to "[e]rect a crematory or provide other means for disposing of garbage or refuse. . . ."

The District Court also found authority for the City to engage in the challenged activities in the legislation granting the Water Authority power to develop solid waste treatment

facilities. Ohio Rev. Code § 6123.03 states that the Water Authority is established to protect health and aesthetic values through efficient methods of "disposal . . . or recovery of resources from solid wastes." The Authority is authorized to construct and maintain solid waste projects or to make agreements for their maintenance.

The Authority is empowered to make loans and grants and issue bonds to carry out the statutory purposes and to guarantee the feasibility of projects developed under this statute. Ohio Rev. Code §§ 6123.03, 6123.04, 6123.06 *et seq.* The statute authorizes the Water Authority to "[m]ake and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123 . . .," § 6123.04 (I), and to "[d]o all acts necessary or proper to carry out the powers expressly granted in Chapter 6123 . . . ." § 6123.04 (P). The District Court found that pursuant to this statutory scheme the state legislature had authorized the challenged anticompetitive activities.

II. THE TAKINGS AND DUE PROCESS CLAUSE QUESTIONS

Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. *See* Annots., *Validity of Statutory or Municipal Regulations as to Garbage*, 15 A.L.R. 287 (1921); 72 A.L.R. 520 (1931); 135 A.L.R. 1305 (1941). If any area of the law can be said to be well settled, this one is.

In three pertinent cases, two at the turn of the century in the United States Supreme Court, *California Reduction Company* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner* v. *Michigan*, 199 U.S. 325 (1905), and one in the twenties in the Ohio Supreme Court, *State ex rel. Moock* v. *City of Cincinnati*, 120 Ohio St. 500, 166 N.E. 583, *cert. denied*, 280 U.S. 578 (1929), three cities, San Francisco. Detroit and Cincinnati, each decided to change local garbage collection and disposal practices by ordinance. Each established a reduction plant or "crematory" and gave one private company a monopoly over garbage collection. The ordinances put existing private garbage collectors out of business; they prohibited existing private collectors from competing with the private contractor who was given the municipal monopoly. In each case the private collectors claimed that the change constituted a taking without just compensation and an interference with established rights of private property, the right to compete in the market place, in violation of substantive due process under the Fourteenth Amendment. In the Cincinnati case the private contractors also argued that the city had not been delegated the authority under the state constitutional home rule provisions to restrain trade and that the ordinance violated the garbage collector's right "to private property, and amounted to a special privilege and the creation of a monopoly in favor of the city's public contractor." 120 Ohio St. at 507.

After noting that "[m]any of the questions involved in municipal sanitation have proved to be difficult of solution" — questions "unsolved by experience or science" — the United States Supreme Court held that the creation of such monopoly "cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes." *California Reduction*,

supra, 199 U.S. at 320-21, 323. As support for this result the Court quoted from Sedgwick's Treatise:

> In Sedgwick's Treatise on Statutory and Constitutional Law the author says that "the clause prohibiting the taking of private property without compensation is not intended as a limitaton of those police powers which are necessary to the tranquillity of any well-ordered community, nor of that general power over private property which is necessary for the orderly exercise of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is made."

Id. at 324-25.

The Supreme Court then went on to hold, "according to well-settled principles," that the concept of substantive due process — then in its heyday — did not protect the property rights of the garbage collectors although the cities might have adopted a less restrictive solution to the problem. "If it be said that the city might have adequately guarded the public health and at the same time saved the property rights," the Court concluded, "the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case." *Gardner*, *supra*, at 333. The Ohio case came to the same conclusion:

> [W]e do not enter upon a virgin field, since the overwhelming weight of authority, both state and federal, upholds the municipal right to regulate, supervise, and control sanitation, including the collection and disposal of garbage, under the police power of the city and state; and this may be done, notwithstanding the fact that garbage may have animal food value and the authority for such collection and disposal has been exclusively confided to a single person or agency.

120 Ohio St. at 507-08. Akron is an Ohio home-rule city, like Cincinnati, and on the basis of these three cases and the general law in this area we are satisfied that the city has not violated the takings or due process clause of the United States Constitution or the state home rule provisions by setting up a new reduction, "thermal transfer," or "energy recycling" plant and by requiring that local garbage collectors bring all their garbage to the plant, including recyclable, or marketable, non-noxious garbage.

The plaintiffs and the American Paper Institute argue, however, that the increased value of wastes and the City's appropriation of that value render the old cases anachronisms that should be set aside. They argue that changed economic circumstances and heightened environmental concern make separating and selling such recyclable wastes as metal, paper, and cardboard more feasible now than in the past. They point out that there now exist competitive markets for recyclable wastes. They argue that Akron's purpose in acquiring a monopoly over garbage is not public health, as was the purpose in the old cases, but rather making its energy plant more profitable by insulating it from competition for raw materials. A monopoly imposed for that purpose, they argue, is neither necessary nor efficient.

The old cases are not anachronisms. They are not distinguishable on any of these grounds. The solid waste disposal problem is as serious today for cities as in the past, perhaps more serious. Landfill areas are running out and causing serious air and water pollution and aesthetic problems. The record demonstrates that this is the problem that caused Akron – a heavily industrial area – to plan and build its energy recycling plant.

Nor can the old cases be distinguished because of changed technology. The Supreme Court and other courts upheld governmental monopoly of solid waste years ago while recognizing explicitly that some wastes have value and could be sold in the market place. The record does not demonstrate

that there has been a substantial change in the relative value of recyclable waste. Paper, cardboard boxes and metal have been a substantial part of garbage for years. We have perhaps become more conscious of the need to conserve and reuse resources, but this fact does not distinguish the old cases.

Neither does the fact that the City appropriates the value and sells some of the recyclable wastes, or chooses in manufacturing energy to burn some of the paper and cardboard rather than resell it, distinguish the old cases. Under these cases, the City could have simply taken over all garbage collection as in San Francisco, Detroit and Cincinnati, depriving existing collectors of any business at all. Here the greater would seem to include the lesser, and the fact that the City adopted a less restrictive alternative is not a valid distinction. Since the private collectors claim that they gave substantial rebates to their customers for the recyclable wastes they sold in the market place, at most the value of the recyclables appropriated by the city represents a licensing fee, service charge or tax imposed on persons in the City who generate and collect garbage.

The requirement that collectors deposit at the plant some valuable wastes, the sale of which supports the costs of incineration and the production of energy, is a valid exercise of the police power. The City may appropriate the value of marketable items abandoned by the owner and mixed in the stream of garbage in order to pay part of the general social costs of waste disposal. In addition Akron, a heavily industrial city, was faced with the loss of its main source of supply of energy for many of its downtown industrial and commercial businesses. The economic and social consequences of interruption in the supply of steam would be serious and justify the exercise of the police power challenged here.

The three cases discussed above also satisfy us that the involvement of the private company, Teledyne, in the operation of the plant in return for one-half of the profits from sale of recyclables is not improper under the takings or due

process clause because it redistributes income from private collectors to Teledyne. In each of the cases discussed above the city granted a monopoly right to collect garbage to a single company, permitting that company alone to engage in a profitable business that had previously been done by several firms. The courts held that the public interest in regulation of the collection of garbage was so great that monopolization of the service and the attendant transfer of profits did not violate the takings or due process clause.

III. THE INTERSTATE COMMERCE QUESTION

In recent cases the Supreme Court has developed a test to determine the validity of government actions challenged under the interstate commerce clause. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Minnesota* v. *Clover Leaf Creamery Co.*, 101 S.Ct. 715 (1981). In *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979), the Court presented the test as follows:

> [W]e must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

In the present case, there is no indication that the City's actions are protective measures designed to discriminate against interstate commerce. The appropriation of value under the police power falls on local people who vote in Akron, not on people from out of town. The effect on commerce is minimal. The City continues to sell the recyclable metals in commerce just as did the private collectors. The fact that the city burns some paper and cardboard that would otherwise

be sold in commerce by the private collectors does not discriminate against or substantially burden interstate commerce. The paper is converted to energy that is sold to Akron tire plants and other businesses. The record does not indicate that any national or regional market for paper is substantially affected by Akron's conduct or that supply would be restricted enough to affect prices. The only identifiable costs imposed are local.

Unlike the statutes in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951) (municipal enactment requiring that milk be pasteurized within five mile radius of city violates commerce clause), *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (state law prohibiting importation of garbage into state invalidated under commerce clause as an "economic protectionist" measure designed to impose burden on residents of other states), and other commerce clause cases relied on by plaintiffs, Akron's legislation does not have the effect of taxing or preventing competition by nonresidents. It is not special interest legislation that discriminates against out-of-town people who vote elsewhere in favor of local residents and local voters. The economic costs of the Akron measure fall hardest on people who generate and collect garbage in the City of Akron. Since the Akron ordinance does not discriminate against, or otherwise seriously burden, interstate commerce, the plaintiffs' arguments based on the commerce clause are unpersuasive. Defendants' regulations, therefore, do not violate any of the standards set forth by the Supreme Court in *Pike* v. *Bruce Church, Inc.* and *Hughes* v. *Oklahoma*, *supra*.

IV. THE ANTITRUST QUESTION

The remaining federalism issue is whether the Sherman Act preempts and displaces local legislation creating municipal monopolies – whether restraning competition in solid waste by local government "stands as an obstacle to the accom-

plishment and execution of the full purposes and objectives of Congress" in enacting the antitrust laws. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Plaintiffs argue that the state action exemption to the antitrust laws first articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943) (upholding a California agricultural program restricting the marketing of raisins in order to maintain farm prices), does not apply to cities unless the state by legislation has explicitly authorized the local anti-competitive conduct and maintains a high degree of supervision over the local conduct.

For this argument the plaintiffs rely primarily on *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a case in which a municipal electric utility sought to force customers who lived outside the city into tying and other anticompetitive arrangements. Four members of the Court in that case agreed that the state action exemption does not protect municipalities from antitrust liability when their anticompetitive actions are not (a) "directed or authorized" and (b) "supervised" by the state as a part of a state policy to substitute regulation or monopoly for competition. *Id.* at 410 (discussing *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)). *Accord, California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Chief Justice Burger concurred specially in the opinion, finding the city subject to liability under the Sherman Act, but his reasoning was entirely different from the other members of the majority. He reasoned that the state action exemption should be inapplicable when cities are engaged in business activity, as distinguished from a governmental function. He viewed the operation of a municipal electric company as an entrepreneurial or proprietary function and therefore subject to the antitrust laws. Four members of the Court dissented on the ground that local governmental bodies are simply not subject to the Sherman Act. Another possible rationale for the decision of the majority arises from the fact that the city was seeking to exercise market or monopoly power outside its corporate

boundaries, that is, outside the area in which it was empowered to act as a government under state law. Although the opinions do not stress this fact, it may turn out that the narrow holding of the case is that a city loses its antitrust exemption if it competes with others outside the boundaries of its governmental authority in an area in which it is not politically accountable.

It is difficult for us to apply the *Lafayette* decision since the plurality and dissenting opinions are each supported by four justices, and no line of reasoning commands a majority of the Court. Whatever principle the Supreme Court may settle on in the future respecting municipal antitrust liability, however, we believe the city of Akron is exempt from the Sherman Act in this case. Garbage collection and the operation of incineration plants are traditional activities of local government. As discussed above, the reported cases, state and federal, have long allowed municipalities to create monopolies and restrain competition in carrying out this function. Moreover, in Ohio, the home rule provisions of the state Constitution, as interpreted by the Ohio Supreme Court in the *Cincinnati* case, *supra*, authorize local government to create a municipal solid waste monopoly. The legal system of the state specifically allows the municipal ordinance in question here, and an agency of the state, the Water Authority, maintains some oversight of the facility. In addition, the City is acting entirely within its own governmental boundaries. It is affecting people to whom it is politically accountable. Finally, the United States government has advised us that this municipal activity is in accord with federal energy and environmental policy as established in the Resource Conservation and Recovery Act, and as practiced by the Environmental Protection Agency and the Department of Energy.[5] These departments are encouraging and assisting cities and towns in

[5] Congress has explicitly found that solid waste represents a potential source of energy and that technology exists to produce energy from waste. It has recognized the need to use wastes "to develop

building such facilities and controlling solid waste collection and disposal.

Scholars have pointed out that the essential conflict of values here is the conflict between the ideals of competition and free markets embodied in the Sherman Act and the principles of federalism contained in the Tenth and Eleventh Amendments.[4] In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court reviewed the limits imposed by the Tenth Amendment upon Congressional authority to regulate state governmental activities under its commerce clause power. The Court held that Congress could not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ." *Id.* at 852. Various courts have since used and refined the *National League of Cities* test to determine which of the multitude of local governmental activities are insulated from federal regulation. *See, e.g. Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) (operation of metropolitan airport an integral governmental function; "terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times"); *United Transportation Union* v. *Long Island Ry. Co.*, 634 F.2d 19 (2d Cir. 1980) (provision of commuter rail service an integral governmental function; "not only is [rail service] essential to the public, but it is also essential that the government step in to furnish it"). Although the scope of Tenth Amendment limitations on affirmative congressional action is narrow, Tenth Amendment values should not be narrowly read when Congress has not expressly or by clear implication displaced a traditional exercise of local police power.

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alternative energy sources . . . in order to reduce our dependence" on conventional sources. 42 U.S.C. § 6901(d).

[4] *See, e.g.*, Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context*: Parker v. Brown *in Constitutional Perspective*, 1978 Duke L.J. 389; Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. State L.J. 305; Thomas, City of Lafayette's *State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities*, 1980 Ariz. State L.J. 345.

Since solid waste disposal including the regulation of garbage collection, incineration and "recycling" is a customary area of local concern long reserved to state and local governments by practice, tradition and legal precedent, the Sherman Act should not apply. Tenth and Eleventh Amendment values support the authority of local governments to act in this field. Their plenary, governmental power to deal with such local problems affecting the public interest should not be preempted or displaced by general statutory policies favoring an economic model of competition for businessmen and industrialists operating in private markets.

Finally, there is a policy argument that even if defendants may regulate or monopolize the collection and disposal of nonrecyclable, valueless waste – whether for public health and safety or economic reasons – they may not do so for recyclables. This is because once recyclables are separated from the mass of garbage, their transport and reuse cause no danger to the public health and impose no costs upon the community. In addition, a market for recyclables has grown up in recent years, whose development should be encouraged rather than inhibited by the government. Finally, because no market failures exist leading to the creation of a natural monopoly, defendants are not economically justified in their intervention and regulation in the maket for recyclables.

We are uncertain whether or not this argument represents good public policy. The legislators, planners and administrators involved do not agree with it. The planners and legislators for the City, the Environmental Protection Agency and the Department of Energy agree that private markets should be replaced by municipal control of recyclable wastes in this instance. The policy question here, in our judgment, is debatable and should not be taken out of municipal hands by federal courts in the absence of congressional intent clearly expressed.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C78-65A

GLENWILLOW LANDFILL, INC., *et al.*

Plaintiffs

v.

CITY OF AKRON, OHIO, *et al.*

Defendants

Civil Action C78-1733A

HYBUD EQUIPMENT CORPORATION, *et al.*

Plaintiffs

v.

CITY OF AKRON, OHIO, *et al.*

Defendants

Memorandum Opinion And Order

In December 1976, the City of Akron, Summit County, and the Ohio Water Development Authority (OWDA) entered into a cooperative agreement to enable the OWDA to sell $46,000,000 worth of revenue bonds so the City could develop a recycle energy system. To fulfill its obligations under the agreement, the City enacted Ordinance No. 846-1976. The plaintiffs in these two cases allege that certain covenants of the cooperative agreement and the ordinance are illegal because: they deprive plaintiffs of due process of law under the fourteenth amendment;[1] they take property in violation of the

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[1] Although the complaint alleges a claim based on the equal protection clause of the fourteenth amendment to the United States Constitution, that claim has not been discussed by the plaintiffs in any of their briefs to this Court.

fifth amendment to the United States Constitution as applied to the states through the fourteenth amendment; they restrain interstate commerce in violation of Article I, section 8 of the Constitution; they violate Article 18, section 3 of the Ohio Constitution; and they violate sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1-2. The plaintiffs seek declaratory and injunctive relief, and an award of attorney's fees.

The Court has jurisdiction of the action under 28 U.S.C. §§1331, 1337 and 2201. The parties ask the Court to exercise pendent jurisdicton over the state law claim. Venue is proper in this district under 28 U.S.C. §1391(b), 15 U.S.C. §§15, 22. The Court duly heard testimony and received exhibits on May 14, 15, 16, 17 and 18, 1979. The following shall constitute the Court's findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

I. FACTS

The parties have stipulated to the great proportion of the relevant facts.[2] Paragraphs 1 through 50 and 90 through 92 of the pre-trial stipulation are incoporated herein as Appendix A. The remaining porton of the stipulation, paragraphs 51 through 89 and part of paragraph 5, is incorporated herein as Appendix B.[3] The stipulation entered into at trial, paragraphs 4 through 13 of the Ohio Water Development Authority's proposed findings of fact, is incoporated herein as Appendix C. In addition the Court finds the following facts:[4]

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[2] The parties also put 36 depositions into evidence by stipulation. Two of the depositions, those of Ned Oberlin and Richard Bain, were never filed with the Court and are therefore not part of the evidence considered.

[3] Appendix B shall remain under seal as it contains confidential information that is subject to a protective order entered by the Court.

[4] The plaintiffs have moved the Court to reconsider an evidentiary ruling made during the course of trial and have asked the Court to admit portions of the deposition of Kenneth Sheperd and several related exhibits into evidence. The Court declines to alter its prior

1. The city built the RES to solve its solid waste disposal problem. A number of factors, including Ohio Edison's desire to stop generating steam for the downtown business district, caused the city to decide the RES was the best alternative available to solve the waste disposal problem.

2. The underwriters decided it was necessary to assure a supply of waste to the RES in order to market the revenue bonds. After learning this the city and the OWDA concluded that it would be necessary to require that all waste collected within the city limits would be taken to the RES.

A. Sherman Act

When both constitutional and statutory violations are alleged it is preferable for the Court to consider the statutory questions first, thus avoiding advisory opinions on constitutional issues if possible. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). This Court will, therefore, first consider the alleged antitrust violations.

Initially the Court must consider whether the plaintiffs have standing to challenge the covenants and the ordinance on antitrust grounds. The defendants argue that the plaintiffs lack standing to attack the legality of the covenants because the covenants by themselves have no force or effect and cause the

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ruling that the evidence should be excluded under Rule 408, Federal Rules of Evidence, as part of a proposed compromise to end the present litigation. The plaintiff has tried to show that the defendants failed to object to the discovery of these matters and thus waived their right to object to its admissibility, but questions of admissibility — unlike matters of privilege — are not so waived. See Wright & Miller, Federal Practice & Procedure § 2156. Accordingly, the motion for reconsideration is hereby denied. Alternatively, the Court finds that if the deposition and exhibits were held admissible to show bias and prejudice as permitted under Rule 408, the additional evidence would not cause the court to alter any of its findings of fact.

plaintiffs no injury in fact. See *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). But the plaintiffs' antitrust claims include allegations of conspiracy.

Under the Sherman Act an agreement in restraint of trade is illegal. Proof of the actual effect on commerce caused by the conspiracy is not always required to establish a violation of the statute. *E.g.*, *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940). The cooperative agreement is arguably evidence of an illegal conspiracy in restraint of trade which may be illegal under the Sherman Act without proof of its actual effects. Therefore the Court does not believe that the plaintiffs must show injury in fact caused by the covenants to raise the Sherman Act claims. Furthermore, the enforcement of the ordinance will subject the plaintiffs who collect solid waste within the city to potential criminal penalties if they violate its terms. If injury in fact was a requirement to assert the Sherman Act claims the waste collectors would still have standing to challenge the defendants' agreement under the Sherman Act: arguably they were injured by the ordinance that was enacted pursuant to the covenants of the cooperative agreement.[5]

Regarding the substance of the plaintiffs' antitrust claims, the defendants argue that their conduct is exempt from the operation of the Sherman Act under *Parker* v. *Brown*, 317

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[5] In declaratory judgment actions it is often necessary for the court to examine another facet of the the case or controversy requirement and to determine whether the dispute is ripe for adjudication. The parties do not question, and the Court finds no reason to doubt the ripeness of the instant dispute. See Buckley v. Valeo, 424 U.S. 1 (1976); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *Cf.* Andrus v. Allard, 48 U.S.L.W. 4013, 4017 n.21 (Nov. 27, 1979) ("All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself suffices to give them standing to litigate their interest in the construction of the statutes.")

U.S. 341 (1943), and its progeny. In *Parker* a California raisin grower challenged the California prorate program under the Sherman Act.[6] The Supreme Court assumed that the program would vioate the Sherman Act if it was organized and made effective solely by an agreement between private parties. The act, however, derived its force and effect from the legislative command of the state. The Supreme court found

> nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51. Thus, the Court decided that the administration of the California act was not covered by the Sherman Act.

The defendants argue that their conduct is similarly protected for two reasons, first because of the powers granted to the OWDA which make it the state agency with power over waste disposal facilities, and second because of the home-rule powers granted to the City of Akron under state law.

Section 6121.02 of the Ohio Revised Code creates the OWDA.[7] The OWDA's powers with respect to waste disposal

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[6] The California Agricultural prorate Act authorized the establishment of programs for the marketing of agricultural commodities produced in the state, to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The program was administered by a commission of nine persons, eight members appointed by the governor and confirmed by the senate, and the ninth, an *ex officio* member, the state's director of agriculture. 317 U.S. at 346.

[7] The OWDA is made up of eight members. Five are appointed by the governor with the advice and consent of the senate; the state's directors of natural resources, environmental protection, and energy are *ex officio* members. § 6121.02, Ohio Revised Code.

facilities are set out in secion 6123.03 of the Ohio Revised Code:

> It is hereby declared to be the public policy of the state through the operations of the Ohio water development authority . . . to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal salvage and reuse of or recovery of resources from solid wastes thereby eliminating or decreasing accident and health hazards including rodent and insect sectors of disease, public nuisance and the adverse effect on land values caused thereby and the scenic blight marring the landscape, [and] to assist in the financing of solid waste facilities. . . . In furtherance of such public policy, the Ohio water development authority . . . may make loans and grants to governmental agencies for the acquisition or construction of solid waste facilities by such governmental agencies . . . and may issue solid waste revenue bonds of this state payable solely from revenues, to pay the cost of such projects.

The defendants contend that the powers granted to the OWDA within its sphere of authority are comparable to the power granted to the Supreme Court of Arizona over the practice of law, and that their actions should be accorded the immunity recognized in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-63 (1977).

In *Bates* the Supreme Court held that enforcement of the state supreme court's disciplinary rule which prohibited attorneys from advertising in newspapers and other media was exempt from the Sherman Act under the doctrine of *Parker* v. *Brown, supra*. The Court isolated three factors in reaching its conclusion. First, the Court noted that the defendant in *Bates* was the state and not a private party.[8] Second, the Court

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[8] In *Bates*, the state supreme court had promulgated the regulation in question, and the state supreme court was the state agency responsible for overseeing the activities of the bar. This situation can be contrasted with *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975), where the county bar association and the state bar asso-

found that the state of Arizona had an interest in protecting the public that was intimately connected to its regulation of the activities of the bar. Finally, the Court saw in the disciplinary rules a clear articulation of the state's policy with regard to professional behavior, and active supervision and review of the state policy by the responsible state agency. 433 U.S. 361-62.

The Court will assume *arguendo* that if private parties entered into the covenants contained in the cooperative agreement to carry out the terms of the challenged ordinance their actions would violate the Sherman Act. Examining the factors outlined by the Supreme Court in *Bates*, the Court first finds the OWDA is a state agency and that its power to determine state policy concerning the issuance of state revenue bonds for facilities like the RES is supreme. Second, the Court determines that the state has a legitimate interest in promoting safe and sanitary methods of solid waste disposal; the state's concerns, and their relationship to the health and welfare of the people of Ohio, are explained in section 6123.03 of the Ohio Revised Code. The state also has a legitimate interest in giving financial aid to it subdivisions to establish projects that serve these goals without harm to the state's treasury; thus the OWDA's concern for the viability of the RES revenue bonds is a legitimate state concern. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (recognizing the importance of financial considerations in structuring local government services).

Finally, the statutes creating the OWDA and establishing its powers clearly articulate the state's policies. The OWDA ac-

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ciation had adopted minimum fee schedules. Neither of the bar associations was the state agency responsible for regulating the bar and the responsible agency — the state supreme court — had not adopted or enforced the fee schedules, and was not named as a defendant. The Court therefore found that state action was not involved and the Parker exemption did not apply. In *Bates* the state was a party through its agent, the state supreme court.

tively participated in drafting the covenants of the cooperative agreement, and thus played a major role in creating the challenged ordinance which was in all material respects set out in the covenants.[9] In doing this the OWDA was acting for the state under express statutory authority to further the state policies declared in section 6123.03 of the Ohio Revised Code. See also Ohio Revised Code §§ 6123.04, .13 (further describing the powers of the OWDA). The Court concludes that the powers of the OWDA within its sphere of authority are comparable to those of the state agencies examined in *Bates* and *Parker*, and that its activities are outside the reach of the Sherman Act.

The defendants also argue that the city is a subdivision of the state exercising sovereign powers, and that the city's enforcement of the challenged ordinance is within the *Parker* v. *Brown* exemption. The home-rule powers granted to charter cities under the Ohio Constitution are sufficient, in the defendants' view, to give them sovereignty equal to that of the state within their borders. The plaintiffs respond that the Supreme Court has held that the activities of the city of Lafayette, Louisiana are outside the *Parker* v. *Brown* exemption, and that cities in Ohio should not be treated differently solely on the basis of home-rule powers established by state law, citing *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

The Court in *City of Lafayette* held that a municipal light plant was not within the *Parker* v. *Brown* exemption when it was competing with other power companies in areas outside the city limits. The Justices who found Lafayette's activities were not exempt recognized nonetheless that in some situa-

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[9] The plaintiffs emphasize the role the underwriters played in establishing the need for the ordinance. The underwriters were hired by the OWDA to market the bonds. The fact that the OWDA and the city relied in part on the underwriter's expertise in making their decision to support and enact the ordinance does not make it any less their decision.

tions municipalities may exercise the sovereign powers of the state.

The home-rule powers given to municipalities under the Ohio Constitution authorize charter cities to establish governmental policy within their corporate limits to the extent that the legislature has not set a uniform state policy. Ohio Const. Art. XVIII, § 3. In other words, in the language of *Bates*, the Ohio Constitution declares that cities act as agents of the state when they exercise governmental powers within their city limits. The Ohio Constitution grants these powers in broad terms, and does not explicitly define the scope of a city's power to regulate competition in the sphere of solid waste disposal. Rather than declare a state-wide policy to be implemented by state or local authorities, Ohio's waste disposal policy is to permit local authorities to declare the policy that will control within their borders. The Ohio courts have recognized that local governments are responsible for regulating the collection and disposal of solid waste within their borders — by monopoly if the city finds it appropriate. See *State ex. rel. Moock* v. *Cincinnati*, 120 Ohio St. 500 (1929); *City of Canton* v. *Van Voorhis*, 61 Ohio App. 419 (1939).

The plaintiffs argue that the intent to displace competition must be more clearly enunciated by the state. In *City of Lafayette* the plurality opinion [10] approved the Fifth Circuit's understanding of *Parker*, saying a state mandate to displace competition is present "when it is found 'from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of.'" 435 U.S. 415 (citations omitted). The plurality expressly recognized: "Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monop-

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[10] That is, part III of Justice Brennan's opinion. Justices Marshall, Powell and Stevens joined in all three parts of Justice Brennan's opinion; Chief Justice Burger joined in part I of the opinion and in the judgment.

oly basis." 435 U.S. 416-17.[11] Ohio has recognized that municipalites may choose to provide waste disposal services on a monopoly basis. Furthermore, the Third Circuit has said that the intent of the state to restrain competition in a particular area "may be demonstrated by explicit language in state statutes, *or may be inferred from the nature of the powers and duties given to a particular government entity.*" *Duke & Co.* v. *Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975) (emphasis added). In Ohio the state has delegated to local authorities the power to declare the policy that will control within their borders. The Court does not believe that the state's policy choice is entitled to less weight because it has chosen diversity over homogeneity. This is particularly true in areas of traditional local concern such as the collection and sanitary disposal of solid waste which is the focus of the challenged ordinance.

The Court has thus found, for two alternative reasons, that the challenged activities are exempt from the operation of the Sherman Act. Having decided that the statutory claims will not determine the case, the Court must consider the constitutional issues raised by the plaintiffs.

B. Commerce Clause

The plaintiffs claim that the ordinance impermissibly restricts interstate commerce in violation of the commerce clause, article I, section 8 of the United States Constitution. The commerce clause gives Congress the power to regulate commerce between the states. If there is no federal regulation preempting the field in a particular area,[12] the states are free to regulate so long as the restraints imposed do not transgress

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[11] It is also worth noting that in *City of Lafayette* the anticompetitive activities all took place outside the city limits while the city was engaging in proprietary activity. Here, the plaintiffs challenge an ordinance that is effective only within the city limits and which was adopted to provide the city residents with safe and sanitary waste disposal.

[12] Plaintiffs do not claim any preemption in this case. See Philadelphia v. New Jersey, 437 U.S. 617, 620-21 & n.4 (1978).

the terms of the commerce clause itself. The scope of permissible state regulation is not found in the words of the commerce clause; rather it has emerged gradually through judicial interpretation. See *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623 (1978).

Before proceeding to consider the merits of the plaintiffs' commerce clause claim, the Court must consider whether the parties before it can properly raise these issues. As previously noted, for the plaintiffs to have standing to raise a claim they must assert that the challenged activity causes them injury in fact. *Warth, supra; Eastern Kentucky, supra.* The covenants do not impinge on the plaintiffs' activities in any way. Therefore the Court finds that the plaintiffs do not have standing to challenge the constitutionality of the covenants. The waste collectors will be subject to criminal prosecution if they fail to comply with the terms of the ordinance. They thus have standing to challenge the ordinance under the commerce clause. Because the commerce clause challenge attacks the ordinance on its face and not as applied to any particular plaintiffs, and since the plaintiffs seek only declaratory and injunctive relief, it is unnecessary to consider whether all of the plaintiffs have standing to challenge the constitutionality of the ordinance; a finding that the waste collectors have standing will be sufficient.

In evaluating an ordinance under the commerce clause the Court must ask:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. *Oklahoma*, 99 S. Ct. 1727, 1736 (1979). See *Philadelphia* v. *New Jersey, supra* at 624; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The party challenging the legislation

has the burden of showing the discrimination against interstate commerce that is the focus of the first inquiry. *Hughes, supra* at 1736.

The Akron ordinance affects only solid waste that is collected within the city;[13] thus it categorizes waste based on its geographic place of origin. Yet under the ordinance waste originating outside Ohio is not distinguished from Ohio waste originating outside the city limits. In *Hughes, Philadelphia*, and *Pike* the unconstitutional statutes drew lines along the state boundary. The Akron ordinance directly affects only intrastate activities, and any effect on interstate commerce is indirect. Nor do the plaintiffs argue that the ordinance restrains interstate commerce in solid waste. They argue that commerce is restrained in the recylclable materials that can be separated from the solid waste. Since the ordinance acts only on solid waste, any burden on interstate commerce in recyclable goods moving in interstate commerce is indirect and incidental.

The second inquiry for the Court under the commerce clause is whether the ordinance serves a legitimate local purpose. The Akron ordinance serves the legitimate goal of making it possible to build the RES and thus assures the safe and efficient disposal of solid waste generated within the city.[14]

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[13] The plaintiffs argue that the ordinance is subject to two possible interpretations. Under the first construction all persons collecting waste that is generated within the city of Akron must obtain a license to collect waste and must take to the RES all waste material generated within the city that is deemed acceptable for disposal there. Under the second construction the collectors must take all waste generated within the city limits to the RES, and any collector transporting non-Akron waste over Akron streets, avenues, and alleys must take that waste to the RES as well. The Court finds that the language of the ordinance is susceptible only of the first construction, and the Court's analysis of the ordinance is based on this understanding.

[14] The legitimate governmental purposes that support the city's determination to construct the RES are more fully described in conjunction with the Court's discussion of the due process claims, *infra* at 16-17.

Turning to the final inquiry, the Court finds that the plaintiffs have not shown that the city's goals could be served by legislation that would impose a smaller burden on interstate commerce. The plaintiffs do suggest that the city should attract waste to the RES by making it economically advantageous to use the RES. The city considered that possibility, but determined the ordinance was necessary.

As not one of the three parts of the test has been shown, the Court holds that the ordinance is not invalid under the commerce clause.

C. Due Process

The plaintiffs raise two arguments under the due process clause of the fourteenth amendment. First they argue that the ordinance is not sufficiently related to legitimate governmental objectives to pass scrutiny under the due process clause of the fourteenth amendment. Second, they argue that if the ordinance does serve a legitimate public purpose, it effects a taking of their property for which they must be compensated as provided in the fifth amendment which is applied to the states through the fourteenth amendment.[15]

Plaintiffs' first argument under the due process clause asks the Court to subject the ordinance to substantive due process analysis: the Court is to determine whether the city's police power regulation has the appropriate and direct connection to the health, welfare, and safety of city residents. *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Patterson* v. *Kentucky*, 97 U.S. 501 (1878). See *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). The defendants argue that the health, welfare, and safety of city residents were motivating factors behind the construction of the RES. Health and safety problems are a constant concern with landfill opera-

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[15] Again the Court notes that the covenants cause the plaintiffs no injury in fact, and they therefore have no standing to challenge their constitutionality.

tions. Health and safety concerns also require that the city maintain a public disposal site to discourage unauthorized dumping of waste within the city limits. The defendants say also that the public welfare required the city to pursue an alternative to landfilling for waste disposal in the Akron area because of the increased difficulties encountered in locating and purchasing suitable landfill sites.

The plaintiffs emphasize the role played by a number of interested private parties: Teledyne, who will operate the RES and receive a portion of its profits (if any); Dillon Read, the firm that headed the underwriting team; Ohio Edison, with an old steam generating facility and downtown customers who need steam. Examining the intent of the council that enacted the city ordinance the plaintiffs stop with the explicit statement within the enactment:

> WHEREAS, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed.

The plaintiffs argue that the ordinance was enacted to promote narrow private financial interests, without a proper public purpose.

The Court finds that the plaintiffs' understanding of the legislative purpose is overly circumscribed and removes the ordinance from its proper context. As indicated by the whereas clause on which the plaintiffs rely, the ordinance cannot be separated from the RES. Likewise, the city's purpose in constructing, and in financing the construction of the RES cannot be separated from the ordinance. The cooperative agreement and the covenants further demonstrate this connection that plaintiffs attempt to deny.

The city's initial concern for a long term solution to the problem of safely and efficiently disposing of solid waste prompted it to explore recycling and incineration as possible

solutions. Over time, as studies were being conducted and as various alternatives were being explored, many factors entered into the decisionmaking and caused the city to finally settle on the RES as the best available method for solving the local, solid waste disposal problem. The magnitude of the problems the city has encountered with landfilling and the chronology of events convince the Court that the city's motivation in building the RES and enacting the ordinance was not to advance private business interests or to undertake proprietary activity. The private interests and the private parties involved in financing and operating the RES do not negate the overriding public purposes and governmental concerns that caused the city to promote the RES and to pass the ordinance.

In *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner* v. *Michigan*, 199 U.S. 325 (1905), the Supreme Court considered arguments that ordinances regulating garbage collection were unconstitutional deprivations of property. The Court held that the ordinances were valid exercises of the police power and that they did not unconstitutionally deprive the citizens of the several municipalities of their property. The plaintiffs in the instant case have tried to show themselves outside the rule of *California Reduction* and *Gardner* in several ways.

The waste collectors argue that their interest in the waste they collect is different from the interest in garbage asserted by the citizens of a municipality. Plaintiffs say that the ordinance takes something of value from the waste collectors and confers a corresponding benefit on the government. They argue that this attempted regulation must be distinguished from governmental regulation that acts evenhandedly on all citizens to control a nuisance. In this connection the plaintiffs emphasize the differences between the garbage that was being regulated in 1905 and the solid waste and recylclable materials that are regulated by the Akron ordinance. The Court recognizes that there are materials of value within solid waste. It is likewise true that if solid waste is not properly disposed of it

can create the same dangers to the public health, welfare, and safety as the garbage of 1905. Thus the Court concludes, as did the Supreme Court in *California Reduction*, that provisions to assure the proper disposal of waste "cannot be properly regarded . . . as a taking of private property for a public purpose, without compensation, simply because such garbage [or waste] may have had . . . some element of value." 199 U.S. at 323. The Court finds that the ordinance is a regulation adopted to control a nuisance (or potential nuisance) that incidentally impacts on some collectors who separate materials of value from the waste they collect.

The plaintiffs do recognize that "[t]he public interest addressed by the RES is the need of the Akron community to have a satisfactory waste disposal facility." But, they say: "the RES does not address any perceived problem in the business activities of the Plaintiffs." If perceived problems in the business activities of the plaintiffs were the justification for the ordinance, then the lack of any perceived problem in their business activities would seem to be a matter for the Court's concern. The ordinance is, however, part of the city's broader scheme to dispose of waste in a safe and sanitary manner at the RES. The ordinance is a reasonable means to achieve this legitimate goal.

Citing *Moore* v. *City of East Cleveland, supra* the plaintiffs argue that the ordinance's relation to this broader public purpose is not sufficient to sustain it. They say that the ordinance must be subjected to a more rigorous scrutiny before the Court can call it proper means to achieve a legitimate end. In *Moore* the Supreme Court invalidated a local zoning ordinance [16] explaining that:

> When a city undertakes such intrusive regulation of the family . . .; the usual judicial deference to the legislature

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[16] Mrs. Moore lived with one of her sons, his son, and another grandson; the two grandsons were first cousins. Because her household did not comply with the definition of family in the local zoning ordinance, Mrs. Moore was convicted of a criminal offense.

> is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." . . . . Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

494 U.S. at 499 (citations omitted). The plaintiffs have not shown that the ordinance interferes with their interests in a manner that is comparable to the intrusion into matters of personal and family choice that were at issue in *Moore*.[17] The "usual judicial deference to the legislature" is therefore appropriate.

Having found that there is a legitimate public purpose for the ordinance, the Court must address the plaintiffs' second argument under the fourteenth amendment, and determine whether the ordinance takes their property for a public purpose without affording them the just compensation required by the fifth amendment.

The plaintiff waste collectors argue that under Ohio law the waste they collect is abandoned property and that, once it is put in their trucks, they own the waste. Before the ordinance the collectors were always free to take their waste, i.e. their property, to any disposal site they chose. By mandating that they take the waste to the RES the waste collectors claim that the ordinance takes their property without giving them compensation.

The Court notes, however, that the collectors collect waste within the city of Akron only after they have obtained a

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[17] As discussed *infra* at 20-25 the Court finds the plaintiffs have not established that the ordinance interferes with any property interest protected by the Constitution. Plaintiffs have not attempted to show that the Akron ordinance interferes with any protected liberty interest.

license to do so. Under the ordinance the city will not seize the waste that is now in the trucks nor the waste in the transfer station. The ciy is regulating where the waste may be taken for disposal. Before the effective date of the ordinance the collectors are free to choose from among several disposal sites. The ordinance removes that choice, and collectors who continue to collect solid waste in Akron while the ordinance is in force will have to abide by its terms. The ordinance takes from the waste collectors the expectation that they would always be able to take the waste they collected within the city to a disposal site of their choice. The plaintiffs have not shown that this is a property right requiring protection under the fifth amendment.

Property rights that are protected by the federal constitution are defined by reference state law or common law. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577-78 (1972). The plaintiffs rely on a series of state court cases where the courts found that regulations similar to the ordinance at issue here impermissibly interfered with the property rights of landfill owners. *Parker* v. *Provo City*, 543 P.2d 769 (1975); *Acme Disposal Corp* v. *Southeast Berrien County Landfill Authority*, Case No. 75-2130-CE (Mich. Ct. App. Oct. 23, 1975); *Thompson* v. *County of Blue Earth*, Case No. 37447 (Minn. Ct. App. May 28, 1974). Those courts, did not, however, describe the property interest they found it necessary to protect, nor did they offer analysis to support their result. This Court finds them unpersuasive. The plaintiffs have also failed to explain what property interest of the waste collectors this Court should protect based on those authorities.

In the procedural due process context, the Supreme Court has recognized that actions of governmental entities can foster expectations that may ripen into property rights. In *Board of Regents of State Colleges, supra*, an assistant professor at a state university challenged the university's decision not to rehire him for another year claiming he had not been given the procedural due process to which he was entitled. The Court found that the had been teaching under a one year employ-

ment contract, and there were no statutory or administrative standards defining eligibility for re-employment. The Court held that the teacher had not shown any property or liberty interest that was infringed when he was not given a new contract. Considering a similar due process challenge by another teacher in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Court found that the teacher, whose contract was not renewed, had alleged facts that raised a genuine issue as to his interest in continued employment at the college. The teacher's reliance on a *de facto* tenure program described in official policy statements issued by the college suggested a possible property interest in continued employment. The plaintiffs have not shown that the waste collectors' expectations were fostered by any official statement. The Court does not find that the expectations are a ligitimate claim of entitlement that requires the protection of the fifth amendment.

The landfill operators and Budoff Iron and Metal, which operates the transfer station, have shown that the ordinance causes them injury by forcing solid waste to the RES that would otherwise come to them, depriving them of tipping fees and reclyclable materials. These plaintiffs therefore have standing to challenge the ordinance.[18] As they may have property interests that are protected by the fifth amendment in situations where the waste collectors do not, it is necessary to examine their fifth amendment claims separately.

These plaintiffs rely on the same series of state court cases that the court has already determined to be unpersuasive. The transfer station and the landfills merely had the expectation that the waste collectors would continue to bring waste from the city of Akron to them for disposal. They have not shown that this expectation rises to the level of a legitimate claim of entitlement or other property interest protected by the fifth amendment.

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[18] For the other constitutional claims previously examined the arguments raised by the waste collectors were no different from the arguments of the landfill operators. Thus, it has been unnecessary until this point to examine the standing of the landfill operators.

Alternatively, accepting the argument of the waste collectors that the ordinance impacts on their ability to dispose of the waste they collect which is part of the traditional property concept of ownership, the Court finds nonetheless that this is not a compensable taking under the fifth amendmnent.

In zoning cases where governmental regulation affects real property interests it is well established that reasonable restrictions imposed for the health, welfare, and safety of the population are not unconstitutional deprivations of property; rather, they have been held to be legitimate exercises of the police power. *E.g., Village of Euclid* v. *Ambler Realty*, 272 U.S. 365 (1926); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). Similarly, in *Andrus* v. *Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979), the Supreme Court held that a regulation prohibiting the sale of artifacts containing eagle feathers was not a taking for which compensation was required. The Court said that "governmental regulation — by definition — involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or exploitation of private property." *Id.* at 4017.[19] In considering the plain-

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[19] Having noted that "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate" the Supreme Court analyzed the regulation at issue:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Id. (citations omitted). The plaintiff waste collectors may argue that more than one strand has been taken from their bundle: they do not have the right to donate or devise the waste they collect and the Akron ordinance does therefore accomplish a taking for which compensation must be paid. Analogizing to the zoning context, the Court

tiffs' first claim under the due process clause the court has determined that the ordinance is a proper exercise of the city's police powers. The Court likewise concludes that the ordinance is not a taking for which compensation must be paid under the fifth amendment.

D. State Constitutional Claim

The plaintiffs' final claim is that the ordinance violates the state constitution. Article XVIII, section 3 of the Ohio Constitution provides:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

The plaintiffs' position is that the extraterritorial effects of the ordinance are so extensive that the ordinance effectively regulates matters outside the city limits and violates this constitutional provision.

Plaintiffs rely on a Minnesota case, *Wayne* v. *County of Blue Earth, supra*, saying that the Ohio courts would reach a similar result and invalidate the local ordinance under the state constitution. As is apparent from the plaintiffs' brief, however, the Minnesota court was interpreting the due process clause of the state constitution. The Ohio constitutional provision at issue here is very different.

The Ohio case of City of *Canton* v. *Whitman*, 44 Ohio St. 2d 62 (1975), is likewise inapposite because that case presented a clash between the uniform state policy of the state environmental protection agency, which required fluoridation, and

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finds that the owners of the eaglefeather artifacts are in the posture of a property owner with a noncomforming use. In contrast, the waste collectors who chose to pay for a waste collection license in Akron when the ordinance is in effect are in a posture comparable to a new owner who has purchased a home subject to the zoning ordinance. The ordinance restricts the waste collectors, but it is not a taking.

the city's decision not to add fluorides to the city water supply. Here there is no similar clash. Akron's ordinance was in fact supported by the OWDA, the state agency responsible to promote waste disposal facilities.

The Court finds that the Akron ordinance regulates waste collection and disposal within the city limits and is a proper exercise of the city's home rule powers under the Ohio Constitution.

E. Conclusion

Having found that the activities of the defendants are exempt from the Sherman Act under the doctrine of *Parker* v. *Brown*, that the ordinance does not violate the commerce clause, or the fourteenth amendment to the United States Constitution, and that the ordinance is not in violation of Article XVIII section 3 of the Ohio Constitution, the Court concludes that judgment shall be entered for the defendants and against the plaintiffs on all claims.

IT IS SO ORDERED.

LEROY J. CONTIE, JR.

Leroy J. Contie, Jr.
U. S. District Judge

APPENDIX A

Jurisdiction and Venue

1. All defendants admit the jurisdictional allegations of the consolidated complaints except that OWDA denies the jurisdictional basis for plaintiffs' 42 U.S.C. §1983 claim against it.

2. Venue is proper in this district by virtue of 28 U.S.C. Section 1391(b), 15 U.S.C. Section 15, and 15 U.S.C. Section 22. All defendants either inhabit, transact business, reside or are found in this district and all claims asserted have arisen in this district.

The Plaintiffs

3. Plaintiff Glenwillow Landfill Inc. (hereinafter "Glenwillow") is a private corporation organized and existing under the laws of the State of Ohio. Plaintiff Portage Landfill Inc. (hereinafter "Portage") is a sole proprietorship. Plaintiffs Glenwillow and Portage operate sanitary landfill disposal sites located in the Counties of Cuyahoga and Portage, Ohio, respectively. These disposal sites, which are licensed pursuant to Ohio Revised Code, Chapter 3734, are open to the public for the disposal of solid waste materials. Parties depositing waste materials at Glenwillow and Portage disposal sites pay said plaintiffs a fee based on the quantity of waste deposited. Accordingly, a significant portion of the income derived by said plaintiffs from the operation of their disposal sites is attributable to the deposit of solid waste materials. As of June 1, 1978, Glenwillow maintained a tipping charge of approximately $4 to $5 per ton. As of January 1, 1978, Portage maintained a tipping charge of approximately $4.40 per ton.

4. Plaintiff J. R. Hawley Sanitation, Inc. (hereinafter "Hawley") is a private corporation organized and existing under the laws of the State of Ohio. Plaintiff Kovach Sanitation (hereinafter "Kovach") is a sole proprietorship. Plaintiffs Hawley and Kovach are haulers of waste material, licensed by the City of Akron, Ohio, and own and operate waste collec-

tion vehicles, waste containers and related waste collection equipment in the City of Akron, Ohio, in Summit County outside the City and in areas outside the County. Under the terms of various agreements between said plaintiffs and certain industrial and commercial concerns situated within and outside the City of Akron, Ohio, said plaintiffs covenant to remove the waste materials generated by said concerns, in return for which said plaintiffs receive a fee, based on the quantity of waste removed therefrom.

5. Plaintiff Hybud Equipment Corp. (hereinafter "Hybud") is a private corporation organized and existing under the laws of the State of Ohio and is a hauler of waste material, licensed by the City of Akron and other jurisdictions in which it operates which require licenses. Hybud owns and operates waste collections vehicles, waste containers and related waste collection equipment in the City of Akron and County of Summit, Ohio, and in several contiguous counties in Ohio. Under the terms of various agreements between said plaintiff and certain industrial and commercial concerns situated within the City of Akron and County of Summit, Ohio, and in contiguous counties in Ohio, said plaintiff covenants to remove the waste materials generated by said concerns, in return for which said plaintiff receives a fee, based on the quantity of waste removed therefrom. Plaintiff Hybud also designs and manufactures solid waste containers and compactors and other types of waste handling equipment, some of which it places or leases at the location of its customers in and outside the City of Akron and the remainder of which it sells to third parties. Plaintiff Hybud has also sold bags for containment of solid waste to its customers and to others from time to time.

. . .

6. Plaintiffs Hawley, Kovach and Hybud presently operate some collection routes in which solid waste collected in the City is mixed in the same trucks with waste collected outside the City.

7. Plaintiff Budoff Iron and Metal Corp. (hereinafter "Budoff") is a private corporation organized and existing under the laws of the State of Ohio. Said plaintiff owns and operates a transfer station within the City limits of Akron, Ohio. Budoff (a) receives at the transfer station "source segregated" cardboard and waste materials containing recoverable cardboard and metal, most of which is collected by plaintiff Hybud in Akron, Summit County and contiguous counties in Ohio; (b) removes therefrom cardboard and metals, (c) sells such recovered materials to paper and scrap metals dealers (or other customers) and (d) disposes of the residue of unrecovered waste materials at a landfill.

The Defendants

8. Defendant City of Akron is a charter municipality in Ohio. The City encompasses an area of 54 square miles. In 1976, its population approximated 269,000.

9. Defendant John Ballard is the Mayor of the City of Akron, Ohio.

10. Defendants Ray Kapper, Elsie Reavan, James R. Williams, Tim David, Vincent Ciraco, Robert L. Goehler, Reginald K. Brooks, Kathleen Greissing, Robert J. Otterman, Mickey Eritano, Jr., John V. Frank, Don Plusquellic and William C. Grimm, or their duly appointed or elected successors, are residents of the City of Akron and members of the Akron City Council, being duly elected in accordance with the City's Charter.

11. Defendant Robert Edwards is the Public Service Director for the City of Akron.

12. Defendant Summit County ("the County") is a county organized and existing under the constitution and laws of the State of Ohio, containing approximately 416 square miles, and having a population, as of 1976, of approximately 535,000 persons.

13. Defendants Mark Ravenscraft, Ted Cole and Don Stephens, or their duly elected or appointed successors to of-

fice, are residents of the County and comprise the Board of Summit County Commissioners, being duly elected in accordance with the laws of the State of Ohio.

14. Defendant Ohio Water Development Authority ("OWDA") is "a body corporate and politic of the State of Ohio," created by Chapter 6121 of the Ohio Revised Code.

Nature of the Akron Area Waste Business

15. The residents and businesses located in the City of Akron and in Summit County, Ohio, generated approximately 1300 tons of solid waste material daily in 1976. Single and two-family residential waste generated in the City of Akron is either collected by City trucks or by private trucks operated by a firm under contract to the City and licensed by the City. Virtually all other residential solid waste, as well as solid waste generated by commercial or industrial establishments in the City (hereinafter sometimes referred to as "commercial waste"), is collected by private firms, licensed by the City, which contract directly with these customers.

16. Residential waste collected by City trucks or firms under City contract presently is disposed of at the Hardy Road Landfill operated by the city, which charges a fee for all waste it receives based upon volume. Private firms collecting residential waste, but not under City contract, or commercial waste in the City or County are presently, and always have been, free to take such material to whatever public or private disposal site they find most economical, whether inside or outside the City or County. Collectors are also presently, and always have been, free to separate, process, recycle or resell any such waste material they collect.

17. The public and private landfills, including plaintiffs, now operating in the Akron-Summit County area required to hold permits under State law and are inspected by County or Municipal Boards of Health and by the Ohio EPA. Private landfills in this area have competed among themselves and with public sites to attract waste material in the past and do so presently as well.

The Recycle Energy System

18. During the period 1950 to 1970, the City operated a series of facilities within its corporate limits to dispose of solid waste generated in the City and neighboring communities; specifically:

Facility	Inclusive Dates of Operation
Evans Avenue incineration plant	Closed 1954
Landfill at Robinson Clay Products Clay Pit	1952-1955
Kelly Avenue Landfill	1955-1963
Cuyahoga Street (North of Tallmadge Parkway) Landfill and Peck Road Landfill	1963-1968
Cuyahoga Street (Near the Workhouse) Landfill	1969-1970

In addition to the City's facilities, the City of Barberton operated an incinerator and there were a number of disposal facilities located throughout the County.

19. In the late 1960's, officials in Akron and Summit County foresaw a need for new solid waste disposal facilities, principally triggered by two factors:

(1) The solid waste disposal regulations (effective July 1, 1968) adopted by the Public Health Council (now EPA) pursuant to the Ohio Waste Disposal Act (Chapter 3734, Ohio Revised Code) placed substantial constraints on future location and operation of waste disposal sites.

(2) The Cuyahoga Street Landfill, then the only sanitary landfill in the County, was fast filling up.

20. The need for new facilities was discussed at several meetings between the Mayors of Akron, Cuyahoga Falls and Barberton during the first quarter of 1968. Beginning in mid-1968, representatives of the County participated in these meetings.

21. The City's Department of Planning and Urban Renewal ("Planning Department") undertook, in early 1968, a Comprehensive Regional Waste Disposal Study ("the Study") to find a long-term solution to disposing of solid waste in the Akron area. The Planning Department considered a number of alternative means to effect a long-term solution, including sanitary landfill, transfer stations, incineration, composting, railhaul to strip mines, etc. Part 1 of this Study, dated August, 1968, was devoted to sanitary landfills. In preparing this study, City employees inventoried existing disposal facilities both within and outside of Summit County. They also studied 102 potential landfill sites within Summit County, but concluded that only 7 of these sites, all located in the southern part of the County, were feasible for landfill development based on the criteria of the study.

22. As part of its study, the City also helped finance and participated in a solid waste railhaul study sponsored by the American Public Works Association to research the technology and feasibility of hauling compacted solid waste to strip mines for disposal.

23. In May, 1968, representatives of the City took a field trip to New York and New Jersey to study the operation of solid waste incinerators in three communities. In late 1968, the Planning Department prepared a rough draft of Part 2 of its study devoted to incineration.

24. In February, 1969, the City appropriated $22,000 to hire Glaus, Pyle & Schomer to undertake a "Study Of The Methods And Feasibility Of Incineration For Waste Disposal" including "[a]nalysis of waste heat recovery possibilities and consideration of waste heat recovery to offset expenses." Glaus, Pyle concluded that the technology for constructing

and operating a "Recycle Energy System" (RES) to convert solid waste to steam or electricity was available but economically unfeasible at the time. Consequently the Glaus, Pyle study was shelved in September, 1969.

25. Meanwhile, the expected closing of the Cuyahoga Street Landfill created an immediate need to find a new disposal site. In meetings between officials of the County and City, alternative solutions were discussed. In early 1969, officials of the City and County agreed to cooperate in creating a new landfill to be operated by the City as a regional project. In March, the Commissioners created a Garbage and Refuse Disposal District consisting of all of the unincorporated territory in the County pursuant to Title 343 of the Ohio Revised Code to facilitate the establishment and operation of a new regional landfill site; and the City decided to establish a new sanitary landfill on a site it owned on Hardy Road in Northampton Township. In May, 1969, the Township Trustees filed suit against the City to enjoin a landfill operation on the Hardy Road site (*Leo Blower, et al.* v. *The City of Akron*, Summit County Case No. 276209), and the Court issued a preliminary injunction partially enjoining the acceptance of solid waste at the Hardy Road landfill site. This litigation was ultimately settled by agreement dated December, 1969, pursuant to which the City agreed to cease operating a landfill at the Hardy Road site at the expiration of five years, with a provisional right to operate for an additional three years if it had "operated the landfill strictly in accordance with applicable laws and regulations" during the first five year period. On April 21, 1970, the Board of Summit County Commissioners adopted Resolution 441-70, authorizing an agreement between the County and the City of Akron for the opening, operation and maintenance of the Hardy Road Landfill by the City of Akron as a waste disposal facility within Garbage and Refuse Disposal District No. 1.

26. The Hardy Road landfill opened for business in June, 1970. Total annual tonnage disposed of at the landfill from 1971 through 1978 is as follows:

Year	Tons*
1971	79,000
1972	70,988
1973	101,958
1974	164,325
1975	239,900
1976	239,399
1977	272,273
1978	284,122

* The scales at Hardy Road periodically fail to operate. Consequently, actual tonnage delivered exceeds these figures.

The landfill has generated complaints from some area residents, the County Board of Health and the Ohio EPA. In 1975, Northampton Township again filed suit to shut down the landfill (*Board of Trustees of Northampton Township* v. *City of Akron*, Summit Co. C.P. Case No. 7592121); and in 1977, the County Board of Health instituted a proceeding to revoke the City's license to operate the landfill. In 1978, the City succeeded in annexing the Hardy Road site and contiguous land, thereby relieving it of its contractual obligation to the Township to discontinue landfill operations on the site that year.

27. In 1970 and 1971, the Planning Department continued its study, investigating a number of new technologies to dispose of solid waste, including pyrolosis, the generation of gas from solid waste. Among other things, City officials visited RES projects in Montreal, St. Louis, Chicago and Rochester.

28. In February, 1971, Ohio Edison petitioned the Public Utilities Commission to abandon its steam heating system in Akron because it was unprofitable to Ohio Edison and because the Company was faced with substantial new capital re-

quirements to meet tightened state air emission standards. The PUCO ultimately denied this petition. That same month, Council authorized the Planning Department and Glaus, Pyle to undertake an RES preliminary feasibility study.

29. In July, 1971, the Planning Department issued its "Comprehensive Regional Waste Disposal Study." The report summarized existing solid waste disposal facilities in the County and concluded that they would be filled by 1978. The report then examined alternative methods for providing a long-term solid waste disposal solution including:

(1) sanitary landfill;

(2) incineration;

(3) composting of solid waste;

(4) rail haul;

(5) size and volume reduction methods (shredding and crushing); and

(6) resource recovery techniques.

In August, 1971, Glaus, Pyle issued its RES report entitled, "Feasibility Study of Solid Waste Reduction Energy Recovery."

30. In the year following issuance of the Planning Department and Glaus, Pyle reports, the City's administration took the proposed RES project under advisement. In September, 1972, after a visit to the RES steam plant in Hamilton, Ontario, Mayor Ballard indicated support for the RES project. On October 2, Council held a public hearing on the project; on October 17, the City's Health Commission approved and supported the project. In November, Council passed a resolution inviting proposals from engineering firms interested in designing the project. In April, 1973, after considering a number of alternative technologies, Council authorized the administration to retain Glaus, Pyle to design an RES project at a cost not to exceed $710,000.

31. In May, 1974, the City's Planning Department issued a report entitled "Solid Waste Disposal in the Akron Area." In June, 1974, Glaus, Pyle issued its Preliminary Phase Report on the RES plant. In December, 1974, final plans and specifications for the RES project were completed. In December, 1974, construction contracts were let out for bid; and in February, 1975, the City received bids on all construction contracts for the project.

32. Commencing in March, 1975, the City, its bond counsel and its financial consultant began formulating concrete plans to finance the project by the issuance of revenue bonds. It was recognized that one element of the project's feasibility was its ability to obtain sufficient solid waste of adequate BUT content over the term of the bonds. To provide an assurance of supply, Council authorized the Director of Public Service to contract with "other units of local government and/or private firms for the deposit of trash and garbage for disposal at the recycle energy system."

33. In mid-1975, the underwriters advised the City that its proposed RES revenue bonds would not be marketable. Consequently, the City asked the Ohio Water Development Authority ("OWDA") to finance the project. OWDA agreed to finance the project at its September 11, 1975 meeting. Construction contracts were immediately awarded to the low bidders subject to obtaining financing for the project. However, in early November, 1975, counsel for OWDA opined that the City could not secure the OWDA's bonds from its general fund, and, therefore, the proposed financing had to be restructured. In the succeeding months, the underwriters unsuccessfully attempted to restructure the financing. In the course of time, the City began looking for new underwriters. In July, 1976, Dillon, Reed & Co. agreed to head a new underwriting team to purchase and resell the OWDA's RES bonds.

34. The new underwriting team substantially restructured the proposed financing in an effort to make the

OWDA's bonds for the RES project marketable. Among other things, the underwriters:

(1) renegotiated the steam contracts with B. F. Goodrich, Akron University and Akron City Hospital to provide stronger long-term guarantees; and

(2) required the creation of a separate $10,000,000 Project Contingency Fund to cover construction cost overruns.

The steam contracts were successfully renegotiated and the City created the $10,000,000 Project Contingency Fund by committing $5,000,000 of its own general obligation money and obtaining the County Commissioner's agreement to commit $5,000,000 of the County's general obligation money to the contingency fund.

35. The Project, to be located in, operated and owned by, the City of Akron, entered construction in December, 1976, and is scheduled to commence operation in September, 1979. It essentially consists of a solid waste shredding facility, classification and separation facilities, three industrial spreader-stokers and boilers capable of employing shredded solid waste as fuel to create steam, and existing and proposed steam distribution lines and systems located in the City of Akron, Ohio. The Project is to provide steam to many of the some 200 businesses and other energy customers presently buying steam from Ohio Edison and to other energy customers as well. Already signed to long-term contracts with the Project are approximately thirty area businesses, including B. F. Goodrich Company, and other energy customers. The Project will remove from waste it receives ferrous scrap and will seek to sell such scrap in existing markets for such material. The Project will also, if and when economically feasible, extract other metals and non-metallic waste components for sale. Defendant City has projected that revenues of the RES from the sale of ferrous material for the first year of operation of the RES will be approximately $681,000 and will increase in subsequent years.

36. On November 10, 1976, the City entered into a contract with Teledyne National, a division of Teledyne Industries, Inc. ("Teledyne"), a California corporation, to supervise construction of the Project and then to operate it for a five-year term, renewable at one-year intervals thereafter if both parties agree. Teledyne's contract includes a basic $360,000 fee, plus certain incentives, for construction supervision and a cost reimbursement plus $150,000 fixed fee arrangement for operation. In addition, Teledyne will receive half of all gross revenues of the Project attributable to sale of recovered ferrous and other materials in excess of certain minimum revenues and related expenses. The approximate volume of solid waste presently being brought to the Hardy Road Landfill from all sources is 1300 tons per day. The Project is designed to process up to a maximum of 2240 tons of solid waste per day. It is Teledyne's present intention to operate at the level of approximately 1400 tons per day.

37. An incentive to Teledyne in entering the contract to operate the RES was its agreed share of revenues from ferrous or other recoverable sales. Based on guidelines to be issued by the City, Teledyne will designate waste materials that are acceptable to the Project.

The Cooperative Agreement

38. On October 4, 1976, Council authorized the City to enter into a Cooperative Agreement with OWDA and the County to finance the RES facility. On October 14, the Board of County Commissioners authorized the county to execute the Cooperative Agreement by Resolution 1381-76. Section 5.5 of this agreement provides that the City ("LGA") covenants with the OWDA for the benefit of the bond holders that:

> "H. The LGA will not establish, construct or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal by the Project and for which the Project has capacity available and which the OWDA determines to be detrimental to the Project, and,

further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. The LGA System shall not charge to or collect from the Project any charge for the haulage or disposal of (i) any Solid Waste residue remaining after processing by the Project and (ii) any Solid Waste which is delivered to the Project and which is not suitable for incineration by the Project or resource recovery, and the LGA shall be responsible for the disposal of such Solid Waste.

I. For the term of this Agreement, the LGA shall require that all collectors and haulers of Solid Waste within the LGA be licensed by the LGA and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the LGA which is acceptable for disposal by the Project to be delivered to the Project for disposal through the Project and require that such haulers and collectors and the LGA pay or cause to be paid the fees and charges imposed by the LGA for the disposal of Solid Wastes at the Project. The LGA will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the LGA and which is acceptable for disposal by the project, to be delivered to the Project for disposal through the Project.

* * *

"O. . . . The LGA shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the Project at a level which assures an adequate supply of Solid Waste for the purpose of the Project and, subject to the foregoing, shall be comparable with competitive charges for such services. . . ."

Under Section 5.6 of the Cooperative Agreement, the County covenants with OWDA for the benefit of the bond holders that:

"A. The County will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment which OWDA solely determines to be detrimental to the Project of Solid Waste which is acceptable for disposal by the Project and for which the Project has capacity available, and further to the extent legally permissible, it will oppose the establishment, construction or operation of such facilities.

"B. The County will take all legally available action, administrative, judicial and legislative, to cause all Solid Waste generated within the County and which is acceptable for disposal by the Project and for which the Project has capacity available, to be delivered to the Project for disposal through the Project."

39. Contained in section 6.10 of the Cooperative Agreement are the following warranties and representations made by the County in entering into the Cooperative Agreement:

(a) The County is a county duly organized and existing under the laws of the State, is not in violation of any provision of the Constitution or laws of the State relevant to the transactions contemplated by this Agreement or the Indenture.

(b) The County has full power and authority to execute and deliver this Agreement and to carry out the transactions contemplated thereby. This Agreement and such contracts have by proper action been duly authorized, executed and delivered by the County and all steps necessary have been taken to constitute this Agreement a valid and binding obligation of the County.

(c) The execution, delivery and performance by the County of this Agreement and the consummation of the transactions contemplated hereby will not violate any provision of the constitution, law, resolution or regulation applicable to the County, or of any writ or decree of any court or governmental instrumentality, or of any indenture, contract, agreement or other undertaking to which the County is a party or which purports to be binding upon the County or upon any of its assets.

40. Counsel for the County states that the County has taken no action to implement its covenants under Section 5.6 of the Cooperative Agreement. None of the other parties to this suit is aware of any such action by the County.

41. The Cooperative Agreement was signed by the City, the County and OWDA effective December 1, 1976.

42. On December 6, 1976, OWDA issued an Official Statement noticing the offering of $46,000,000 of special obligation bonds to finance the acquisition, construction and equipping of the Project. Contained in the Official Statement is a restatement of the Cooperative Agreement.

The Ordinance

43. On October 4, 1976, prior to but in contemplation of and for the purpose of giving effect to the covenants undertaken by the three governmental entities in the Cooperative Agreement, the Council of the City of Akron, Ohio, passed Ordinance No. 841-76 (hereinafter "Ordinance"). This Ordinance, which amends Section 850.06, 1068.06 and 1068.14 of the Codified Ordinances of the City of Akron (hereinafter "Codified Ordinances"), revised licensing requirements and service charges with respect to the collection and disposal of garbage and rubbish within the City of Akron. Specifically, Section 1(a) of the Ordinance amends Section 850.06 of the Codified Ordinance as follows:

> "(a) Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor."

Section 2 of the Ordinance amends Section 1068.06 of the Codified Ordinance as follows:

> "No person, except duly authorized collectors of the city or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the

same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal."

Section 3 of the Ordinance establishes a collection and disposal fee for garbage and rubbish generated within the City's limits during the calendar year 1978. Section 3 also provides that:

"[t]he Director of Public Service is authorized to promulgate rules and regulations for the collection of said service charge and he is further authorized with consent of Council to adjust such charge upward on January 1, 1979 or on January 1 of any year thereafter."

44. The prefatory language contained in the Ordinance states:

"Whereas, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed."

Effect of the Ordinance

45. Collectors and transporters of solid waste in the City presently holding licenses issued by defendant City, including plaintiffs Hawley, Kovach and Hybud, and persons who may in the future apply for and obtain such licenses, shall be required, as a condition of such licenses, after the RES commences operation, to bring to RES all solid waste collected in the City and which the City determines to be acceptable for RES, and to pay RES such fees for disposal there as the City shall establish from time to time. Persons holding such licenses who fail or refuse to comply with said requirements shall be subject to potential loss of such licenses, in which case

they will be prohibited from collecting or transporting solid waste in the City of Akron, or they may be subject to criminal prosecution by the City. Parties who collect solid waste within the City without licenses as prescribed by the Ordinance will be subject to criminal prosecution.

46. Solid waste "acceptable for disposal" by the RES, as prescribed in the Ordinance, shall include all solid waste generated in the city other than hazardous wastes or certain items the RES is not equipped to handle. Such rejected items will not include paper, cardboard or most other combustibles or most materials containing ferrous or other recoverable metals.

47. The Ordinance will prevent plaintiffs Hawley, Kovach and Hybud, or any other persons holding City licenses, from taking solid wastes subject to the Ordinance (i.e., solid waste collected within Akron which is acceptable for disposal at RES) to private or public disposal facilities outside of the City after RES commences operation, including plaintiffs Glenwillow and Portage.

48. To the extent plaintiffs Hawley, Kovach or Hybud, or any other collectors presently, or in the future, holding licenses from the City, may, due to economic or other competitive or business factors, seek to engage in the separation of paper, cardboard, metals or other materials from the solid waste they collect that is subject to the Ordinance, for the purpose of selling such recovered materials for profit, the effect of the Ordinance will be to prevent said collectors from doing so.

49. To the extent public or private entities located in Ohio or outside Ohio may wish to purchase materials recovered from solid waste subject to the Ordinance, and to the extent they would otherwise be able to do so but for the Ordinance, the effect of the Ordinance will be to prevent them from doing so, other than directly or indirectly from the RES.

50. To the extent plaintiff Budoff or any other firms in Ohio may purchase or otherwise receive solid waste subject to the Ordinance, and to the extent they would otherwise be able to do so but for the Ordinance, the effect of the Ordinance will be to prevent them from receiving such solid waste.

90. The City, County and OWDA participated in the issuance of $46,000,000 in revenue bonds.

91. The bonds described in ¶ 90 were purchased by persons inside and outside Ohio.

92. Defendant City will offer for sale to customers inside and outside of Ohio ferrous material recovered by RES from Akron solid waste.

APPENDIX C

B. Emergence of The Akron-Summit County Solid Waste Disposal Problem and Genesis of RES

4. Single and two-family residential waste generated in the City of Akron is either collected by City trucks or by private trucks operated by a firm under contract to the City which is licensed to collect and haul solid waste in the City. Virtually all other solid waste generated in the City, including commercial and industrial solid waste is collected by private firms licensed by the City to collect and haul solid waste within its corporate limits. During the period 1950 to 1970, the City operated a series of facilities within its corporate limits to dispose of solid waste generated in the City and neighboring communities; specifically:

Facility	Inclusive Dates of Operation
Evans Avenue incineration plant	Closed 1954
Landfill at Robinson Clay Products	1952-1955
Kelly Avenue Landfill	1955-1963
Cuyahoga Street (north of Tallmadge Parkway) Landfill and Peck Road Landfill	1963-1968
Cuyahoga Street (Near the Workhouse) Landfill	1969-1970

In addition to the City's facilities, the City of Barberton operated an incinerator and there were a number of open dumps located throughout the County.

5. In the late 1960's, it became apparent that the Akron-Summit County area would soon be facing a serious waste disposal problem, principally triggered by two factors:

(1) The solid waste disposal regulations (effective July 1, 1968) adopted by the Public Health Council (now EPA) pursuant to the Ohio Waste disposal Act (Chapter 3734, Ohio Revised Code) outlawed the open dumps being operated in the County and placed substantial constraints on future location and operation of waste disposal sites.

(2) The Cuyahoga Street landfill, then the only sanitary landfill in the County, was fast filling up, a condition exacerbated by the increasing quantities of solid waste attracted to the landfill by dump closings.

6. The impending solid waste problem was recognized by responsible officials as a regional problem, and was discussed at several meetings between the Mayors of Akron, Cuyahoga Falls and Barberton during the first quarter of 1968. At the time, Barberton was disposing of its solid waste at two open dumps which could not comply with the new solid waste disposal regulation. Cuyahoga Falls was disposing of most of its solid waste at the Portage Landfill (operated by plaintiff Waldo A. Sober, Jr.); but the City was concerned about the continued ability of that landfill to operate under the new solid waste regulations, as well as the high hauling and disposal costs it was incurring using that landfill. Beginning in mid-1968, representatives of the County participated in these meetings.

7. In response to the solid waste problem, the City's Department of Planning and Urban Renewal ("Planning Department") undertook, in early 1968, a comprehensive study to find a long-term solution to the problem. The Planning Department considered a number of alternative means to effect a

long-term solution to the problem including sanitary landfill, transfer stations, incineration, composting, rail haul to strip mines, etc. Part 1 of this study, dated August, 1968, was devoted to sanitary landfills. In preparing this study, City employees inventoried existing disposal facilities both within and outside of Summit County which they determined to be inadequate. They also studied 102 potential landfill sites within Summit County, but determined that only 7 of these sites, all located in the southern part of the County, were feasible for landfill development from a physical-topographical standpoint.

8. As part of its comprehensive study, the City also helped finance and participated in a solid waste railhaul study sponsored by the American Public Works Association undertaken to research the technology and feasibility of hauling compacted solid waste to strip mines for disposal.

9. In May, 1968, representatives of the City took a field trip to New York and New Jersey to study the operation of solid waste incinerators in three communities. In late 1968 the Planning Department prepared a rough draft of Part 2 of its comprehensive study devoted to incineration. This draft generally concluded, among other things, that:

> "Despite the higher costs, disposal of solid wastes by incineration is inherently prompt, thorough and complete. Modern incinerator facilities are very efficient and are architecturally or aesthetically pleasing. There is little or no separating of solid waste required. A properly designed and operated incinerator can be constructed in a heavily built-up area without creating a nuisance. There should be no problem in meeting the State Health Department requirements.
>
> "It is possible to generate steam or electricity from the waste heat which may be held to offsett the relatively high operating costs." [p4]

The City's planners believed incineration was a superior long-range solution to landfilling for a number of reasons, including the facts that:

(1) An incinerator can be centrally located within the corporate limits, thereby obviating costly hauling and assuring that the City retains control over the facility.

(2) The ash can be used for fill or safely landfilled requiring the utilization of far less land.

(3) Incineration markedly reduces the pollution and nuisances associated with landfills and, to the extent it replaces coal fired boilers, actually reduces air pollution.

(4) The costs of operation can be offset by the sale of steam or electricity and recyclable materials.

10. By February, 1969, the City was sufficiently enthused by the incineration alternative to appropriate $22,000 to hire Glaus, Pyle & Schomer, an A&E firm with considerable experience in boiler design, to undertake a "Study of The Methods And Feasibility Of Incineration For Waste Disposal" including "[a]nalysis of waste heat recovery possibilities and consideration of waste heat recovery to offset expenses." Glaus, Pyle concluded that the technology for constructing and operating a "Recycle Energy System" (RES) to convert solid waste to steam or electricity was available. However, after investigating a number of different markets for steam or electricity which would be produced by an RES, Glaus, Pyle concluded that there was no available market. One such potential market, the steam users in Akron's Central Business District (CBD) whose needs were being satisfied by Ohio Edison, were not enthusiastic about buying steam from the City. Furthermore, the sharp seasonal variations in the CBD's steam load made an RES project to serve the CBD uneconomic unless B.F. Goodrich, which is located close to the CBD and uses substantial quantities of steam year-round for manufacturing purposes, could be persuaded to enter into

a long-term contract to purchase the project's excess steam on an interruptible basis. At that time, B.F. Goodrich was not interested in the project as a long-term source of steam. Consequently, the Glaus, Pyle study was shelved in September, 1969.

11. Meanwhile, an acute solid waste disposal problem created by the increasing quantities of solid waste being delivered to the Cuyahoga Street landfill forced the City's planners to concentrate on finding a stop-gap solution. In October, 1968, Martha D. Nelson, M.D., Health Commissioner of the Summit County General Health District, wrote the County Commissioners warning that the paucity of landfill sites in Summit County posed a serious problem. "This is a most urgent matter as it is entirely possible that on July 1, 1969 the Summit County area would be without any solid waste disposal facility." In subsequent meetings between officials of the County and City, a number of alternatives were discussed. In early 1969, officials of the City and County agreed to cooperate in creating a new landfill to be operated by the City as a regional project; and in March, the Commissioners created a Garbage and Refuse Disposal District pursuant to Title 343 of the Ohio Revised Code to facilitate the establishment and operation of a new regional landfill site.

C. The Hardy Road Landfill — A Short-Term Solution To The Problem

12. Faced with imminent closing of the Cuyahoga Street landfill, the City reluctantly decided to develop a new sanitary landfill on a 100 acre tract of woodland it owned outside of the City on Hardy Road in Northampton Township. The City's decision drew immediate, adverse response from residents in Northampton Township. In May, 1969, the Township Trustees filed suit against the City to enjoin a landfill operation on the Hardy Road site (*Leo Blower, et al.* v. *The City of Akron*, Summit County Case No. 276209), and the Court issued a preliminary injunction partially enjoining the acceptance of solid waste at the Hardy Road landfill site. This litiga-

tion was ultimately settled by agreement dated December, 1969, pursuant to which the City agreed to cease operating a landfill at the Hardy Road site at the expiration of five years, with a provisional right to operate for an additional three years if it had "operated the landfill strictly in accordance with applicable laws and regulations" during the first five year period.

13. The Hardy Road landfill opened for business in June, 1970. Total annual tonnage disposed of at the landfill from 1971 through 1978 is as follows:

Year	Tons*
1971	79,000
1972	70,988
1973	101,958
1974	164,325
1975	239,900
1976	239,399
1977	272,273
1978	284,122

* The scales at Hardy Road periodically fail to operate. Consequently, actual tonnage delivered exceeds these figures.

Since 1975, the Hardy Road landfill has been the only public solid waste disposal facility operating in the Akron area capable of disposing of solid waste. Public and private haulers of the solid waste generated within Akron, Barberton, Cuyahoga Falls and other communities in the Akron area dispose of most of the solid waste they collect in these communities at the City's Hardy Road landfill. Operation of the landfill has generated continuing complaints from its neighbors, the County Board of Health and the Ohio EPA. In 1975, Northamption Township again filed suit to shut down the landfill (*Board of Trustees of Northampton Township* v. *City of Akron*, Summit Co. C.P. Case No. 7592121); and in 1977, the County Board of Health instituted a proceeding to revoke the City's license to operate the landfill. In 1978, the City succeeded in annexing the Hardy Road site and contiguous land, thereby

relieving it of its contractual obligation to the Township to discontinue landfill operations on the site that year. But the operation of the landfill continues to generate protests [from] its neighbors, the County Board of Health and the Ohio EPA.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil Action C78-65A
and C78-1733A

GLENWILLOW LANDFILL, INC., *et al.*

v.

CITY OF AKRON, OHIO, *et al.*

HYBUD EQUIPMENT CORPORATION, *et al.*

v.

CITY OF AKRON, OHIO, *et al.*

JUDGMENT

This action came on for trial before the Court, Honorable Leroy J. Contie, Jr. _____, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered for the defendants and against the plaintiff on all claims.

_____

LEROY J. CONTIE, JR.
Leroy J. Contie, Jr.
U. S. District Judge

APPENDIX G

United States Constitution, amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

United States Constitution, amendment XIV, § 1

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

Sherman Act, 15 U.S.C. § 1, 2

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX J

ORDINANCE NO. 541 — 1976 amending Section 850.06, 1068.06 and 1068.14 of the Codified Ordinances of the City of Akron to revise licensing requirements and service charges with respect to the collection and disposal of garbage and rubbish within the City, and declaring an emergency.

WHEREAS, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed.

NOW, THEREFORE, BE IT ENACTED by the Council of the City of Akron, Ohio:

Section 1. That Section 850.06 of the Codified Ordinances of the City of Akron, Ohio, is hereby amended so as to provide as follows:

"Section 850.06 PLACES OF DEPOSIT; CHARGES

"(a) Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor.

"(b) In the event that the Mayor designates to holders of rubbish haulers' licenses that rubbish hauled, and from and after the date referred to in paragraph (a) above, rubbish not acceptable for disposal at the City's recycle energy plant, shall be deposited at a sanitary landfill site operated by the City, or at a site being operated under agreement with the City, then such rubbish hauler shall pay to the City a fee for each load of rubbish so

deposited, according to a schedule of charges prescribed by the Mayor. The charges prescribed by the Mayor shall be of such amount as to reimburse the City for the cost incurred in disposing of the rubbish so deposited.

"(c) The Mayor is hereby authorized to promulgate such rules and regulations as may be required to carry out the intent of this section."

Section 2. That Section 1068.06 of the Codified Ordinances of the City of Akron, Ohio, is hereby amended so as to provide as follows:

"Section 1068.06 GARBAGE COLLECTED BY CITY OR PRIVATE HAULERS

"No person, except duly authorized collectors of the City or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority of such license, if acceptable for disposal by the City's recycle energy plant be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal."

Section 3. That Section 1068.14 of the Codified Ordinances of the City of Akron, Ohio, is hereby amended so as to provide as follows:

"Section 1068.14 SERVICE CHARGE

"There is hereby established a fee, for combined curbside collection of garbage and rubbish of three dollars ($3.00) per quarter-year, beginning January 1, 1974, and continuing through December 31, 1977, and payable in advance. For so long as and provided the City Demonstration Agency or any other agency or entity pays the three dollar ($3.00) per quarter fee for service to residents of the Model Cities area, then the three dollar ($3.00) per quarter fee provided for herein shall be suspended for said Model Cities residents. The Director of Public Service is authorized to promulgate rules and reg-

ulations for the collection of said service charge, and he is further authorized with the consent of Council to adjust said charge upward or downward on January 1 of each of the years 1975 through 1977, inclusive, such adjustment to be made only to the extent that may be necessary to maintain the total cost of garbage and rubbish collection borne by the general revenue of the City of Akron at $830,000.00 per year. The said service charge shall be applicable only to households which participate in the collection program.

"Effective January 1, 1978, there is hereby established a fee for combined curbside collection of garbage and rubbish and for the disposal thereof of $4.36 dollars per month, payable in advance. The Director of Public Service is authorized to promulgate rules and regulations for the collection of said service charge and he is further authorized with the consent of Council to adjust said charge upward on January 1, 1979 or on January 1 of any year thereafter. The Director of Public Service is further authorized on January 1 of any year when there is on deposit on such date and appropriated by this Council a sum of money to pay costs of such collection and disposal to adjust said service charge downward to a charge which will produce funds which when added to the sum of money so on deposit and appropriated will be sufficient to pay all costs of such collection and disposal. The said service charge shall be applicable only to households which participate in the collection program."

Section 4. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were passed in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 5. That this ordinance is hereby declared to be an emergency measure for the reason that the provisions hereof should become effective at the earliest possible time in order to permit the financing of the recycle energy facility to be accomplished without undue delay, and provided that this ordi-

nance receives the affirmative vote of two-thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Passed: October 4, 1976

EDWARD DAVIS
Edward Davis
Clerk of Council

RAY KAPPER
Ray Kapper
President of Council

Approved: October 5, 1976

_____, Acting Mayor

APPENDIX K

SECTIONS 6123.01 THROUGH 6123.18 OHIO REVISED CODE

§ 6123.01 Definitions.

As used in sections 6123.01 to 6123.21 of the Revised Code:

(A) "Governmental agency" means department, division, or other unit of state government, municipal corporation, county, township, and other political subdivision, or any other public corporation or agency, the United States or any agency thereof, and any agency, commission, or authority established pursuant to an interstate compact or agreement.

(B) "Person" means any individual, firm, partnership, association, or corporation, or any combination thereof.

(C) "Solid waste" means such unwanted residual solid or semi-solid material as results from industrial operations, including those of public utility companies, and commercial, distribution, research agricultural, anfl community operations, including garbage, combustible, noncombustible, or radioactive material, street dirt, and debris.

(D) "Solid waste facilities" means facilities, property; or the modification or replacement of property, for the collection, storage, treatment, utilization, processing, transporting, or final disposal of or recovery of resources from solid waste, including, without limitation thereto, facilities and expenditures which qualify as solid waste disposal facilities under section 103(b)(4)(E) of the Internal Revenue Code of 1954, as amended, and regulations thereunder, facilities which dispose of solid waste by reconstituting, converting, or otherwise recycling it into material which is not waste whether or not operated at a profit, and further includes any property or system to be used in whole or in part for any of the aforesaid purposes, whether or not another purpose is also served, and

any property or system incidental to or which has to do with or the end purpose of which is any of the foregoing. Solid waste facilities as defined in this division are hereby determined to be those which qualify as facilities for solid waste disposal under Section 13 of Article VIII, Ohio Constitution.

(E) "Project" or "development project" means any energy resource development facility as defined in section 1551.01 of the Revised Code, including undivided or other interests therein, or any solid waste facility, including undivided or other interests therein, either separately or in combination with any waste water facility as defined in section 6121.01 of the Revised Code acquired or to be acquired or constructed or to be constructed by the Ohio water development authority under Chapter 6123. of the Revised Code, or acquired or to be acquired or constructed or to be constructed by a governmental agency or person with all or part of the cost thereof being paid from a loan or grant from the authority under Chapter 6123. of the Revised Code, including all buildings and facilities that the authority determines necessary for the operation of the project, together with all property, rights, easements, and interests that may be required for the operation of the project.

(F) "Cost" as applied to development projects means the cost of acquisition and construction, the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights, and interests required for such acquisition and construction, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of acquiring or constructing and equipping a principal office and sub-offices of the authority, the cost of diverting highways, interchange of highways, access roads to private property, including the cost of land or easement therefor, the cost of all machinery, furnishings, and equipment, financing charges, interest prior to and during construction and for no more than eighteen months after completion of construction, engineering, expenses of research and development with respect to development projects, legal expenses, plans, specifica-

tions, surveys, estimates of cost and revenues, working capital, other expenses necessary or incident to determining the feasibility or practicability of acquiring or constructing such project, administrative expense, and such other expense as may be necessary or incident to the acquisition or construction of the project, the financing of such acquisition or construction, including the amount authorized in the resolution of the authority providing for the issuance of development revenue bonds to be paid into any special funds from the proceeds of such bonds and the financing of the placing of such project in operation. Any obligation, cost, or expense incurred by any governmental agency or person for surveys, borings, preparation of plans and specifications, and other engineering services or any other cost described above, in connection with the acquisition or construction of a project may be regarded as a part of the cost of such project and may be reimbursed out of the proceeds of development revenue bonds as authorized by this chapter.

(G) "Owner" includes all individuals, copartnerships, associations, corporations, or governmental agencies having any title or interest in any property, rights, easements, and interests authorized to be acquired by Chapter 6123. of the Revised Code.

(H) "Revenues" means all rentals and other charges received by the authority for the use or services of any development project, any gift or grant received with respect to the lease, sub-lease, sale, including installment sale or conditional sale, or other disposition of a development project, moneys received in repayment of and for interest on any loan made by the authority to a person or governmental agency, whether from the United States or a department, administration, or agency thereof, or otherwise, proceeds of such bonds to the extent of use thereof for payment of principal of, premium if any, or interest on the bonds is authorized by the authority, proceeds from any insurance, condemnation or guaranty pertaining to a project or property mortgage to secure bonds or pertaining to the financing of the project, and income and profit from the

investment of the proceeds of development revenue bonds or of any revenues.

(I) "Public roads" includes all public highways, roads, and streets in the state, whether maintained by the state, county, city, township, or other political subdivision.

(J) "Public utility facilities" includes tracks, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances of any public utility.

(K) "Construction," unless the context indicates a different meaning or intent, includes reconstruction, enlargement, improvement, or providing furnishings or equipment.

(L) "Development revenue bonds," unless the context indicates a different meaning or intent, includes development revenue notes, development revenue renewal notes, and development revenue refunding bonds, except that notes issued in anticipation of the issuance of bonds shall have a maximum maturity of five years as provided in section 6123.06 of the Revised Code and notes or renewal notes issued as the definitive obligation may be issued maturing at such time or times with a maximum maturity of forty years from the date of issuance of the original note.

(M) The "Ohio water development authority" means the authority created by section 6121.02 of the Revised Code.

*HISTORY: 138 ▼ H 144 (Eff 9-28-79); 138 ▼ H 736. Eff 10-16-80.

Cross-References to Related Sections

"Energy resource development facility" defined, RC § 1551.01.

See RC § 6123.03.1 which refers to this chapter.

§ 6123.02 [Operation of authority; liabilities.]

The carrying out of the purposes and the exercise by the Ohio water development authority of the powers conferred on it

by Chapter 6123. of the Revised Code shall be held to be, and are hereby determined to be, essential governmental functions and public purposes of the state, but the authority shall not be immune from liability by reason thereof. Each member shall be reimbursed for his actual expenses necessarily incurred in the performance of his duties under Chapter 6123. of the Revised Code. All expenses incurred in carrying out Chapter 6123. shall be payable solely from funds provided under Chapter 6123. of the Revised Code, appropriated for such purpose by the general assembly, or provided by the controlling board and no liability or obligation shall be incurred by the authority beyond the extent to which moneys have been so provided or appropriated.

§ 6123.03 [Purposes.]

It is hereby declared to be the public policy of the state through the operations of the Ohio water development authority under this chapter to contribute toward one or more of the following: to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid wastes thereby eliminating or decreasing accident and health hazards including rodent and insect vectors of disease, public nuisance and the adverse effect on land values caused thereby and the scenic blight marring the landscape, to assist in the financing of solid waste facilities for industry, commerce, distribution and research, including public utility companies, to create or preserve jobs and employment opportunities or improve the economic welfare of the people of the state, or to assist and cooperate with governmental agencies in achieving such purposes. In furtherance of such public policy, the Ohio water development authority may initiate, acquire, construct, maintain, repair and operate solid waste facilities or cause the same to be operated pursuant to a lease, sub-lease, or agreement with any person or governmental agency; may make loans and grants to governmental agencies for acquisition or

construction of solid waste facilities by such governmental agencies; may make loans to persons for the acquisition or construction of solid waste facilities by such persons; and may issue development revenue bonds of this state payable solely from revenues, to pay the cost of such projects. Any solid waste facilities shall be determined by the authority to be in compliance with Chapter 3734. of the Revised Code and with the regulations adopted by the director of environmental protection under section 3734.02 of the Revised Code. Any resolution of the authority providing for acquiring or constructing such facilities or for making a loan or grant for such facilities shall include a finding by the authority that such determination has been made. Determinations by resolution of the authority that a facility is a solid waste facility under this chapter and is consistent with the purposes of Section 13 of Article VIII, Ohio Constitution, and this chapter shall be conclusive as to the validity and enforceability of the development revenue bonds issued to finance such facility and of the resolutions, trust agreements or indentures, leases, sub-leases, sale agreements, loan agreements and other agreements made in connection therewith, all in accordance with their terms.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

[§ 6123.03.1] § 6123.031 [Energy resource development powers of authority.]

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, and pursuant to Section 13, Article VIII, of the Ohio Constitution, the Ohio water development authority may exercise the powers set forth in this chapter, with the approval of a project by the director of energy, for the purpose of constructing or providing financial assistance for the construction of any energy resource development facilities as defined in section 1551.01 of the Revised Code. Determinations by resolution of the authority that a facility is an energy resource development facility, as so defined, and is consistent with the purposes of

Section 13, Article VIII of the Ohio Constitution and this chapter shall be conclusive as to the validity and enforceability of the development revenue bonds issued to finance such facility and of the resolutions, trust agreements, or indentures, leases, subleases, sale agreements, loan agreements, and other agreements made in connection therewith, all in accordance with their terms.

HISTORY: 137 ▼ H 415 (Eff 12-14-77); 138 ▼ H 144. Eff 9-28-79.

This section was formerly numbered 6121.03.1 (138 ▼ H 144, eff 9-28-79).

§ 6123.04 [Powers and duties.]

For the purposes of Chapter 6123. of the Revised Code, the Ohio water development authority may;

(A) Adopt bylaws for the regulation of its affairs and the conduct of its business under Chapter 6123. of the Revised Code;

(B) Sue and plead in its own name; be sued and impleaded in its own name with respect to its contracts or torts of its members, employees, or agents acting within the scope of their employment, or to enforce its obligations and covenants made under sections 6123.06, 6123.08, and 6123.13 of the Revised Code. Any such actions against the authority shall be brought in the court of common pleas of the county which the principal office of the authority is located, or in the court of common pleas of the county in which the cause of action arose, provided such county is located within this state, and all summonses, exceptions, and notices of every kind shall be served on the authority by leaving a copy thereof at the principal office with the person in charge thereof or with the secretary-treasurer of the authority.

(C) Make loans and grants to governmental agencies for the acquisition or construction of development projects by any

such governmental agency and adopt rules and procedures for making such loans and grants;

(D) Acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to, or contract for operation by, a person or governmental agency, development projects, and establish rules for the use of such projects;

(E) Make available the use or services of any development project to one or more persons, one or more governmental agencies, or any combination thereof;

(F) Issue development revenue bonds and notes and development revenue refunding bonds of the state, payable solely from revenues as provided in section 6123.06 of the Revised Code, unless the bonds be refunded by refunding bonds, for the purpose of paying any part of the cost of one or more development projects or parts thereof;

(G) Acquire by gift or purchase, hold, and dispose of real and personal property in the exercise of the powers of the authority and the performance of its duties under Chapter 6123. of the Revised Code;

(H) Acquire, in the name of the state, by purchase or otherwise, on such terms and in such manner as the authority determines proper, public or private lands, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests as it finds necessary for carrying out Chapter 6123. of the Revised Code, and compensation shall be paid for public or private lands so taken;

(I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. of the Revised Code:

(1) When the cost under any such contract or agreement, other than compensation for personal services, involves an expenditure of more than two thousand dollars, the authority

shall make a written contract with the lowest and best bidder after advertisement for not less than two consecutive weeks in a newspaper of general circulation in Franklin county, and in such other publications as the authority determines, such notice shall state the general character of the work and materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids. Provided, that a contract or lease for the operation of a development project constructed and owned by the authority or an agreement for cooperation in the acquisition or construction of a development project pursuant to section 6123.13 of the Revised Code or any contract for the construction of a development project that is to be leased by the authority to, and operated by, persons who are not governmental agencies and the cost of such project is to be amortized exclusively from rentals or other charges paid to the authority by persons who are not governmental agencies or by governmental agencies that receive the use or services of such project, including governmental agencies that are parties to an agreement for cooperation in the acquisition or construction of such development project pursuant to section 6123.13 of the Revised Code, is not subject to the foregoing requirements and the authority may enter into such contract or lease or such agreement pursuant to negotiation and upon such terms and conditions and for such period as it finds to be reasonable and proper in the circumstances and in the best interests of proper operation or of efficient acquisition or construction of such project.

(2) Each bid for a contract for the construction, demolition, alteration, repair, or reconstruction of an improvement shall contain the full name of every person interested in it and who meets the requirements of section 153.54 of the Revised Code.

(3) Each bid for a contract, except as provided in division (I)(2) of this section, shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into and the performance thereof secured.

(4) The authority may reject any and all bids.

(5) A bond with good and sufficient surety, approved by the authority, shall be required of every contractor awarded a contract except as provided in division (I)(2) of this section, in an amount equal to at least fifty per cent of the contract price, conditioned upon the faithful performance of the contract.

(J) Employ managers, superintendents, and other employees and retain or contract with consulting engineers, financial consultants, accounting experts, architects, attorneys, and such other consultants and independent contractors as are necessary in its judgment to carry out Chapter 6123. of the Revised Code, and fix the compensation thereof. All expenses thereof shall be payable solely from the proceeds of development revenue bonds or notes issued under Chapter 6123. of the Revised Code, from revenues, or from funds appropriated for such purpose by the general assembly.

(K) Receive and accept from any federal agency, subject to the approval of the governor, grants for or in aid of the construction of any development project or for research and development with respect to solid waste facilities or energy resource development facilities, and receive and accept aid or contributions from any source of money, property, labor, or other things of value, to be held, used, and applied only for the purpose for which such grants and contributions are made;

(L) Engage in research and development with respect to solid waste facilities or energy resource development facilities;

(M) Purchase fire and extended coverage and liability insurance for any development project and for the principal office and sub-offices of the authority, insurance protecting the authority and its officers and employees against liability for damage to property or injury to or death of persons arising from its operations, and any other insurance the authority may agree to provide under any resolution authorizing its development revenue bonds or in any trust agreement securing the same;

(N) Charge, alter, and collect rentals and other charges for the use or services of any development project as provided in section 6123.13 of the Revised Code;

(O) Provide coverage for its employees under Chapters 145., 4123., and 4141. of the Revised Code;

(P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code.

*HISTORY: 137 ▼ S 303 (Eff 2-14-78); 138 ▼ H 144 (Eff 9-28-79); 138 ▼ S 157. Eff 8-1-80.

[§ 6123.04.1] § 6123.041 [Financing projects for industry, commerce, distribution, or research.]

(A) With respect to projects, and the financing thereof, for industry, commerce, distribution, or research, including public utility companies, under agreements whereby the person to whom the project is to be leased, sub-leased or sold or to whom the loan is to be made for the project is to make payments sufficient to pay all of the principal of, premium, if any, and interest on the development revenue bonds issued for the project, the authority may, in addition to other powers under this chapter:

(1) Make loans for the acquisition or construction of the project to such person upon such terms as the authority may determine or authorize, including secured or unsecured loans, and, for and in connection therewith, enter into loan agreements, accept notes and other forms of obligation to evidence such indebtedness and mortgages, liens, pledges, assignments, or other security interests to secure such indebtedness, which may be prior or subordinate to or on a parity with other indebtedness, obligations, mortgages, pledges, assignments, other security interests, or liens or encumbrances, and take such actions as may be deemed by it appropriate to protect such security and safeguard against losses, including, without limitation thereto, foreclosure and the bidding upon and purchase of property upon foreclosure or other sale;

(2) Sell such project under such terms as it may determine, including, without limitation thereto, sale by conditional sale or installment sale, under which title may pass prior to or after completion of the project or payment or provisions for payment of all principal of, premium, if any, and interest on such bonds, or at any other time provided in such agreement pertaining to such sale, and including sale under an option to purchase at a price which may be a nominal amount or less than true value at the time of purchase;

(3) Grant a mortgage, lien, or other encumbrance on, or pledge or assignment of, or with respect to, all or any part of the project, revenues, reserve funds or other funds established in connection with such bonds, or on, of, or with respect to any lease, sub-lease, sale, conditional sale or installment sale agreement, loan agreement, or other agreement pertaining to the lease, sub-lease, sale or other disposition of a project or pertaining to a loan made for a project, or any guaranty or insurance agreement made with respect thereto, or any interest of the authority therein, or any other interest granted, assigned, or released to secure payments of the principal of, premium, if any, or interest on the bonds or to secure any other payments to be made by the authority, which mortgage, lien, encumbrance, pledge, assignment or such other security interest may be prior or subordinate to or on a parity with any other mortgage, pledge, assignment, other security interest, or lien or encumbrance;

(4) Provide that the interest on such bonds may be at a variable rate or rates changing from time to time in accordance with a base or formula as authorized by the authority;

(5) Contract for the acquisition or construction of such project or any part thereof and for the leasing, sub-leasing, sale or other disposition of such project may be made in a manner determined by the authority in its sole discretion, without necessity for competitive bidding or performance bonds.

(B) Property comprising a project is not subject to taxes or assessments so long as the bonds or notes issued to finance the

costs of such project are outstanding, and the transfer of title to or possession of such property to the person to whom a loan or installment sale or conditional sale with respect to such project is made is not subject to the taxes levied pursuant to Chapters 5739. and 5741. of the Revised Code.

The authority shall certify the property comprising a project which is exempt from taxes and assessments pursuant to this section, and shall send, by certified mail, copies of such certification to the owner of such exempt property, to the tax commissioner, and to the county auditor of the county or counties in which any such exempt property is located.

Each county auditor shall maintain a separate list of all property exempt pursuant to this section and sections 3706.041 [3706.04.1] and 6121.044 [6121.04.4] of the Revised Code, in addition to the list of exempt property required to be maintained pursuant to section 5713.07 of the Revised Code.

(C) The authority, in the lease, sale, or loan agreement with respect to a project referred to in division (A) of this section, shall make appropriate provision for adequate maintenance of the project. The source of the payments sufficient to pay all of the principal, premium, if any, and interest required by division (A) of this section shall be limited to revenue derived from rentals or other charges for the use of the services of the project, and such revenues may be derived from such rentals or charges and paid to the person or the authority by governmental agencies which receive the use or services of the project, including governmental agencies that are parties to an agreement for cooperation in the acquisition or construction of such development project pursuant to section 6123.13 of the Revised Code.

(D) With respect to the projects referred to in this section, the authority granted by this section is cumulative and supplementary to all other authority granted in this chapter. The authority granted by this section does not alter or impair any similar authority granted elsewhere in this chapter with respect to other projects.

*HISTORY: 137 ▼ S 303 (Eff 2-14-78); 138 ▼ H 144. Eff 9-28-79.

§ 6123.05 [Funds for surveys or studies.]

Upon application by the Ohio water development authority, the controlling board may, from appropriations available to the authority, provide funds for surveys or studies by the authority of any proposed development project subject to repayment by the authority from funds available to it, within the time fixed by the board. Funds to be repaid shall be charged by the authority to the appropriate development project and the amount thereof shall be a cost of the project. This section does not abrogate the authority of the controlling board to otherwise provide funds for use by the authority in the exercise of the powers granted to it by Chapter 6123. of the Revised Code.

*HISTORY: 136 ▼ H 144. Eff 9-28-79.

§ 6123.06 [Issuance of bonds; maturity, interest, redemption and liability.]

The Ohio water development authority may issue revenue bonds and notes of the state at such times and in such principal amount as, in the opinion of the authority, are necessary for the purpose of paying any part of the cost of one or more development projects or parts thereof. The authority may likewise issue renewal notes and bonds to pay such notes and, whenever it deems refunding, including funding and retirement, expedient, refund any bonds by the issuance of development revenue refunding bonds of the state, whether the bonds to be refunded have or have not matured, and issue bonds partly to refund bonds then outstanding, and partly for any other authorized purpose. The refunding bonds may be issued in amounts sufficient for payment of the principal amount of the bonds to be so refunded, any redemption premiums thereon, principal maturities of any bonds maturing prior to the redemption of the bonds to be so refunded, interest accrued or to accrue to the maturity dates or dates of redemption of such bonds, and any expenses incurred or to be incurred in connection with such

refunding, funding and retirement and the issuance of the bonds. Except as may otherwise be expressly provided by the authority, every issue of its bonds or notes shall be general obligations of the authority payable out of the revenues of the authority that are pledged for such payment, without preference or priority of the first bonds issued, subject only to any agreements with the holders of particular bonds or notes pledging any particular revenues, provided that revenues of the authority as defined in division (H) of section 6123.01 of the Revised Code shall not be pledged for the payment of water development revenue bonds or notes issuable by the authority under Chapter 6121. of the Revised Code, and revenues of the authority as defined in division (O) of section 6121.01 of the Revised Code shall not be pledged for the payment of development revenue bonds or notes. Such pledge shall be valid and binding from the time the pledge is made and the revenues so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge is valid and binding as against all parties having claims of any kind in tort, contract, or otherwise against the authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded, except in the records of the authority.

Whether or not the bonds or notes are of such form and character as to be negotiable instruments, they have all the qualities and incidents of negotiable instruments, subject only to the provisions of the bonds or notes for registration.

The bonds and notes shall be authorized by resolution of the authority, bear such date or dates, and mature at such time or times, in the case of any such note or any renewals thereof not exceeding five years from the date of issue of such original note and in the case of any such bond not exceeding forty years from the date of issue, as such resolution or resolutions may provide. The bonds and notes shall bear interest at such rate or rates, be in such denominations, be in such form, either coupon or regis-

tered, carry such registration privileges, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption as the authority may authorize. The bonds and notes of the authority may be sold by the authority, at public or private sale, at, or at not less than, such price or prices as the authority determines. The bonds and notes shall be executed by the chairman and vice-chairman of the authority, either or both of whom may use a facsimile signature, the official seal of the authority or a facsimile thereof shall be affixed thereto or printed thereon and attested, manually or by facsimile signature, by the secretary-treasurer of the authority, and any coupons attached thereto shall bear the signature of facsimile signature of the chairman of the authority. In case any officer whose signature, or a facsimile of whose signature, appears on any bonds, notes, or coupons ceases to be such officer before their delivery, such signature or facsimile is sufficient for all purposes, the same as if he had remained in office until such delivery, and in case the seal of the authority has been changed after a facsimile has been imprinted on such bonds or notes, such facsimile seal will continue to be sufficient for all purposes.

Any resolution or resolutions authorizing any bonds or notes or any issue thereof may contain provisions, subject to such agreements with bondholders or noteholders as may then exist, which are a part of the contract with holders thereof, as to: the pledging of all or any part of the revenues of the authority to secure the payment of the bonds or notes or of any issues thereof; the use and disposition of revenues of the authority; a covenant to fix, alter, and collect rentals and other charges so that pledged revenues will be sufficient to pay costs of operation, maintenance, and repairs, pay principal of and interest on bonds or notes secured by the pledge of such revenues, and provide such reserves as may be required by the applicable resolution or trust agreement; the setting aside of reserve funds, sinking funds, or replacement and improvement funds and the regulation and disposition thereof; the crediting of the proceeds of the sale of bonds or notes to and among the funds

referred to or provided for in the resolution authorizing the issuance of the bonds or notes; the use, lease, sale, or other disposition of any development project or any other assets of the authority; limitations on the purpose to which the proceeds of sale of bonds or notes may be applied and the pledging of such proceeds to secure the payment of the bonds or notes or of any issue thereof; as to notes issued in anticipation of the issuance of bonds, the agreement of the authority to do all things necessary for the authorization, issuance, and sale of such bonds in such amounts as may be necessary for the timely retirement of such notes; limitations on the issuance of additional bonds or notes; the terms upon which additional bonds or notes may be issued and secured; the refunding of outstanding bonds or notes; the procedure, if any, by which the terms of any contract with bondholders or noteholders may be amended or abrogated, the amount of bonds or notes the holders of which must consent thereto, and the manner in which such consent may be given; limitations on the amount of moneys to be expended by the authority for operating, administrative, or other expenses of the authority; securing any bonds or notes by a trust agreement in accordance with section 6123.08 of the Revised Code; or any other matters, of like or different character, that in any way affect the security or protection of the bonds or notes.

Neither the members of the authority nor any person executing the bonds or notes shall be liable personally on the bonds or notes or be subject to any personal liability or accountability by reason of the issuance thereof.

*HISTORY: 138 ▼ H 144 (Eff 9-28-79); 138 ▼ H 736. Eff 10-16-80.

§ 6123.07 [Exemption from state laws.]

The issuance of development revenue bonds and notes or development revenue refunding bonds under Chapter 6123. of the Revised Code need not comply with any other law applicable to the issuance of bonds or notes.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.08 [Trust agreement as security.]

In the discretion of the Ohio water development authority, any development revenue bonds or notes or development revenue refunding bonds issued under Chapter 6123. of the Revised Code may be secured by a trust agreement between the authority and a corporate trustee, which trustee may be any trust company or bank having the powers of a trust company within or without the state.

Any such trust agreement may pledge or assign revenues of the authority to be received, but shall not convey or mortgage any development project or any part thereof. Any such trust agreement or any resolution providing for the issuance of such bonds or notes may contain such provisions for protecting and enforcing the rights and remedies of the bondholders or noteholders as are reasonable and proper and not in violation of law, including covenants setting forth the duties of the authority in relation to the acquisition of property, the construction, improvement, maintenance, repair, operation, and insurance of the development project or projects in connection with which such bonds or notes are authorized, the rentals or other charges to be imposed for the use or services of any development project, the custody, safeguarding, and application of all moneys, and provisions for the employment of consulting engineers in connection with the construction or operation of such development project or projects. Any bank or trust company incorporated under the laws of this state that may act as depository of the proceeds of bonds or notes or of revenues may furnish such indemnifying bonds or may pledge such securities as are required by the authority. Any such trust agreement may set forth the rights and remedies of the bondholders and noteholders and of the trustee, and may restrict the individual right of action by bondholders and noteholders as is customary in trust agreements or trust indentures securing similar bonds. Such trust agreement may contain such other provisions as the authority deems reasonable and proper for the security of the bondholders or noteholders. All expenses incurred in carrying out the provisions of any such trust agree-

ment may be treated as a part of the cost of the operation of the development project or projects. Any such trust agreement or resolution authorizing the issuance of development revenue bonds may provide the method whereby the general administrative overhead expenses of the authority shall be allocated among the several projects acquired or constructed by it as a factor of the operation expense of each such project.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.09 [Bondholder may enforce legal rights against authority.]

Any holder of development revenue bonds issued under Chapter 6123. of the Revised Code, or any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights given by such chapter may be restricted by the applicable resolution or such trust agreement, may by suit, action, mandamus, or other proceedings, protect and enforce any rights under the laws of the state or granted under such chapter, trust agreement, or the resolution authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by such chapter, or by the trust agreement or resolution, to be performed by the Ohio water development authority or any officer thereof, including the fixing, charging, and collecting of rentals or other charges.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.10 [Bonds and notes not a debt of state or any political subdivision thereof.]

Development revenue bonds and notes and development revenue refunding bonds issued under Chapter 6123. of the Revised Code do not constitute a debt, or a pledge of the faith and credit, of the state or of any political subdivision thereof, and the holders or owners thereof have no right to have taxes levied by the general assembly or taxing authority of any political subdivision of the state for the payment of the principal thereof or interest thereon, but such bonds and notes are payable

solely from the revenues and funds pledged for their payment as authorized by such chapter, unless the notes are issued in anticipation of the issuance of bonds or the bonds are refunded by refunding bonds issued under such chapter, which bonds or refunding bonds shall be payable solely from revenues and funds pledged for their payment as authorized by such chapter. All such bonds and notes shall contain on the face thereof a statement to the effect that the bonds or notes, as to both principal and interest, are not debts of the state or any political subdivision thereof, but are payable solely from revenues and funds pledged for their payment.

All expenses incurred in carrying out Chapter 6123. of the Revised Code are payable solely from funds provided under such chapter. Such chapter does not authorize the Ohio water development authority to incur indebtedness or liability on behalf of or payable by the state or any political subdivision thereof.

*HISTORY: 138 ▼ H 144. Eff 9-26-79.

§ 6123.11 [All funds received shall be held in trust.]

All moneys, funds, properties, and assets acquired by the Ohio water development authority under Chapter 6123. of the Revised Code, whether as proceeds from the sale of development revenue bonds or as revenues, or otherwise, shall be held by it in trust for the purposes of carrying out its powers and duties, shall be used and reused as provided in such chapter, and shall at no time be part of other public funds. Such funds, except as otherwise provided in any resolution authorizing its development revenue bonds or in any trust agreement securing the same, or except when invested pursuant to section 6123.12 of the Revised Code, shall be kept in depositories selected by the authority in the manner provided in Chapter 135. of the Revised Code, and the deposits shall be secured as provided in Chapter 135. of the Revised Code. The resolution authorizing the issuance of such bonds of any issue or the trust agreement securing such bonds shall provide that any officer to whom, or any bank or trust company to which, such moneys are paid

shall act as trustee of such moneys and hold and apply them for the purposes hereof, subject to such conditions as such chapter and such resolutions or trust agreement provide.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.12 [Moneys received in excess of needs can be invested in notes and bonds.]

Moneys of the Ohio water development authority, except as otherwise provided in any resolution authorizing the issuance of its development or water development revenue bonds or in any trust agreement securing the same, in excess of current needs, may be invested in notes, bonds, or other obligations of the United States, or of any agency or instrumentality thereof, or in obligations of this state or any political subdivision thereof. Income from all such investments of moneys in any fund shall be credited to such funds as the authority determines, subject to the provisions of any such resolution or trust agreement, and such investments may be sold at such times as the authority determines.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.13 [Rental agreements.]

The Ohio water development authority may charge, alter, and collect rentals or other charges for the use or services of any development project and contract in the manner provided by this section with one or more persons, one or more governmental agencies, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges for such use or services. Such rentals or other charges shall not be subject to supervision or regulation by any other authority, commission, board, bureau, or agency of the state and such contract may provide for acquisition by such person or governmental agency of all or any part of such development project for such consideration payable over the period of the contract or otherwise as the authority in its sole discretion determines to be appropriate, but subject to the provisions of any resolution authorizing the issuance of de-

velopment revenue bonds or notes or development revenue refunding bonds of the authority or any trust agreement securing the same. Any governmental agency which has power to construct, operate, and maintain development facilities may enter into a contract or lease with the authority whereby the use or services of any development project of the authority will be made available to such governmental agency and pay for such use or services such rentals or other charges as may be agreed to by the authority and such governmental agency.

Any governmental agency or combination thereof may cooperate with the authority in the acquisition or construction of a development project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, which agreements shall provide for such contributions by the parties thereto in such proportion as may be agreed upon and such other terms as may be mutually satisfactory to the parties including, without limitation, the authorization of the construction of the project by one of the parties acting as agent for all of the parties; the ownership and control of the project by the authority to the extent necessary or appropriate for purposes of the issuance of development revenue bonds by the authority; contracting for the operation, leasing, or subleasing for such term and with such person or governmental agency as may be agreed upon; and the sale or other disposition of such project to such governmental agency as may be agreed upon. The authority shall not enter into such a cooperative agreement with any governmental agency if the authority determines that the project to be acquired or constructed under the agreement would undermine the financial feasibility of an existing development project acquired or constructed under a cooperative agreement between the authority and another governmental agency because the proposed project would serve substantially the same geographic area as the existing project. Any governmental agency may provide the funds for the payment of such contribution as is required under such agreements by the levy of taxes, assessments, or rentals

and other charges for the use of the utility system of which the development project is a part or to which it is connected, if otherwise authorized by the laws governing such governmental agency in the construction of the type of development project provided for in the agreements, and may pay the proceeds from the collection of such taxes, assessments, utility rentals, or other charges to the authority pursuant to such agreements; or the governmental agency may issue bonds or notes, if authorized by such laws, in anticipation of the collection of such taxes, assessments, utility rentals, or other charges and may pay the proceeds of such bonds or notes to the authority pursuant to such agreements. In addition any governmental agency may provide the funds for the payment of such contribution by the appropriation of money or, if otherwise authorized by law, by the issuance of bonds or notes and may pay such appropriated money or the proceeds of such bonds or notes to the authority pursuant to such agreements. The agreement by the governmental agency to provide such contribution, whether from appropriated money or from the proceeds of such taxes, assessments, utility rentals, or other charges, or such bonds or notes, or any combination thereof, is not subject to Chapter 133. of the Revised Code or any regulations or limitations contained therein. The proceeds from the collection of such taxes or assessments, and any interest earned thereon, shall be paid into a special fund immediately upon the collection thereof by the governmental agency for the purpose of providing such contribution at the times required under such agreements.

When the contribution of any governmental agency is to be made over a period of time from the proceeds of the collection of special assessments, the interest accrued and to accrue before the first installment of such assessments is collected, which is payable by such governmental agency on such contribution under the terms and provisions of such agreements, shall be treated as part of the cost of the improvement for which such assessments are levied, and that portion of such assessments as are collected in installments shall bear interest at the same

rate as such governmental agency is obligated to pay on such contribution under the terms and provisions of such agreements and for the same period of time as the contribution is to be made under such agreements. If the assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as such contribution and the county auditor shall annually place on the tax list and duplicate the interest applicable to such assessment and the penalty and any additional interest thereon as otherwise authorized by law.

Any governmental agency, pursuant to a favorable vote of the electors in an election held before or after July 13, 1970 for the purpose of issuing bonds to provide funds to acquire, construct, or equip, or provide real estate and interests in real estate for, a solid waste facility, whether or not such governmental agency, at the time of such election, had the authority to pay the proceeds from such bonds or notes issued in anticipation thereof to the authority as provided in this section, may issue such bonds or notes in anticipation of the issuance thereof and pay the proceeds thereof to the authority in accordance with its agreement with the authority; provided, that the legislative authority of the governmental agency finds and determines that the solid waste facility to be acquired or constructed by the authority in cooperation with such governmental agency will serve the same public purpose and meet substantially the same public need as the facility otherwise proposed to be acquired or constructed by the governmental agency with the proceeds of such bonds or notes.

*HISTORY: 137 ▼ S 303 (Eff 2-14-78); 138 ▼ H 144 (Eff 9-28-79); 139 ▼ H 379. Eff 9-21-82.

§ 6123.14 [Duties of maintenance and repair.]

Each development project, when constructed and placed in operation, shall be maintained and kept in good condition and repair by the Ohio water development authority or the authority shall cause the same to be maintained and kept in good condition and repair. Each such project shall be operated by

such operating employees as the authority employs or pursuant to a contract or lease with a person or governmental agency. All public or private property damaged or destroyed in carrying out the powers granted by Chapter 6123. of the Revised Code, shall be restored or repaired and placed in its original condition, as nearly as practicable, or adequate compensation shall be paid therefor from funds provided under such chapter.

On or before the first day of March in each year, the authority shall make a report of its activities for the preceding calendar year to the governor and the general assembly. Each such report shall set forth a complete operating and financial statement covering the authority's operations during the year. The authority shall cause an audit of its books and accounts to be made at least once each year by certified public accountants and the cost thereof may be treated as a part of the cost of construction or of operations of its projects.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.15 [Bonds acceptable as security.]

All development revenue bonds issued under Chapter 6123. of the Revised Code are lawful investments of banks, societies for savings, building and loan and savings and loan associations, deposit guarantee associations, trust companies, trustees, fiduciaries, insurance companies, including domestic for life and domestic not for life, trustees or other officers having charge of sinking and bond retirement or other special funds of political subdivisions and taxing districts of this state, the commissioners of the sinking fund of the state, the industrial commission, the state teachers retirement system, the public employees retirement system, the school employees retirement system, and the police and firemen's disability and pension fund, and are acceptable as security for the deposit of public moneys.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.16 Tax exemptions.

The exercise of the powers granted by Chapter 6123. of the Revised Code, will be for the benefit of the people of the state, for the improvement of their health, safety, convenience, and welfare, and for the enhancement of their residential, agricultural, recreational, economic, commercial, and industrial opportunities and is a public purpose. As the operation and maintenance of development projects will constitute the performance of essential governmental functions, the Ohio water development authority shall not be required to pay any taxes or assessments upon any development project, or upon any property acquired or used by the authority under Chapter 6123. of the Revised Code, or upon the income therefrom, nor shall the transfer to or from the Ohio water development authority of title or possession of any development project, part thereof, or item included or to be included in any such project, be subject to the taxes levied pursuant to Chapters 5739. and 5741. of the Revised Code, and the bonds and notes issued under this chapter, their transfer, and the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation within the state.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.17 [Right to acquire property; purchase or lease.]

The Ohio water development authority may acquire by purchase, whenever it determines such purchase expedient, any land, property, rights, rights-of-way franchises, easements, and other interests in lands which it finds to be necessary or convenient for the construction and operation of any development project, upon such terms and at such price as it considers reasonable and are agreed upon between the authority and the owner thereof, and take title thereto in the name of the state.

Any governmental agency, notwithstanding any contrary provision of law may lease, lend, grant, or convey to the authority, at its request, upon such terms as the proper authorities of such governmental agencies determine to be reasonable and fair and without the necessity for an advertisement, auction, order of court, or other action or formality,

other than the regular and formal action of the governmental agency concerned, any real property or interests therein including improvements thereto or personal property which is necessary or convenient to effect the authorized purposes of the authority, including public roads and real or personal property already devoted to public use.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

§ 6123.18 [Power to cause removal or relocation of highways, railroads or public utilities.]

When the Ohio water development authority finds it necessary to change the location of any portion of any public road, state highway, railroad, or public utility facility in connection with the construction of a development project, it shall cause the same to be reconstructed at such location as the division of government having jurisdiction over such road, highway, railroad, or public utility facility finds most favorable. Such construction shall be of substantially the same type and in as good condition as the original road, highway, railroad, or public utility facility. The cost of such reconstruction, relocation, or removal and any damage incurred in changing location of any such road, highway, railroad, or public utility facility shall be paid by the authority as a part of the cost of such development project.

When the authority finds it necessary that any public highway or portion thereof be vacated by reason of the acquisition or construction of a development project, the authority may request the director of transportation, in writing, to vacate such highway or portion thereof in accordance with section 5511.07 of the Revised Code if the highway or portion thereof to be vacated is on the state highway system, or, if the highway or portion thereof to be vacated is under the jurisdiction of the county commissioners, the authority shall request the director, in writing, to petition the county commissioners, in the manner provided in section 5553.041 [5553.04.1] of the Revised Code, to vacate such highway or portion thereof.

The authority shall pay to the director or the county, as a part of the cost of such development project, any amounts required to be deposited with any court in connection with proceedings for the determination of compensation and damages and all amounts of compensation and damages finally determined to be payable as a result of such vacation.

The authority may make reasonable regulations for the installation, construction, maintenance, repair, renewal, relocation, and removal of railroad or public utility facilities in, on, over, or under any development project. Whenever the authority determines that it is necessary that any such facility installed or constructed in, on, over, or under property of the authority pursuant to such regulations be relocated, the public utility owning or operating such facilities shall relocate or remove them in accordance with the order of the authority. The cost and expenses of such relocation or removal, including the cost of installing such facilities in a new location, the cost of any lands, or any rights or interests in lands, and any other rights, acquired to accomplish such relocation or removal, may be paid by the authority as part of the cost of such development project. In case of any such relocation or removal of facilities, the railroad or public utility owning or operating them, its successors, or assigns may maintain and operate such facilities, with the necessary appurtenances, in the new location in, on, over, or under the property of the authority for as long a period and upon the same terms as it had the right to maintain and operate such facilities in their former location.

*HISTORY: 138 ▼ H 144. Eff 9-28-79.

APPENDIX L

Ohio Constitution, article XVIII, § 3

§ 3 [Powers.]

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.)

APPENDIX M

Ohio Rev. Code Ann. § 715.43

§ 715.43 Refuse disposal.

Any municipal corporation may provide for the collection and disposal of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain and regulate plants for the disposal thereof.

APPENDIX N

Ohio Rev. Code Ann. § 717.01(c)

§ 717.01 Powers of municipal corporations.

Each municipal corporation may: . . .

(C) Erect a crematory or provide other means for disposing of garbage or refuse, and erect public comfort stations.

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SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-832

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CLERK

HYBUD EQUIPMENT CORP., et al.,
Petitioners,

v.

CITY OF AKRON, OHIO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding that the Parker v. Brown state action exemption to the Sherman Act applied to the City of Akron's ordinance requiring that all solid waste within its limits be taken to its Recycle Energy System plant for disposal where the ordinance was enacted by the City at the insistence of a state agency, acting in furtherance of its legislative mandate, and pursuant to powers vested in the City by state law?

2. Did the Sixth Circuit err in holding that the City of Akron may require that all solid waste collected within its limits be brought to the City's Recycle Energy System for disposal without bringing about an unconstitutional taking of the recyclable materials mixed within that solid waste?

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HYBUD EQUIPMENT CORP., et al.,
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PETITION FOR WRIT OF CERTIORARI
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Ohio Water Development Authority, City of Akron, Ohio, and County of Summit, Ohio, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 742 F.2d 949.

COUNTER STATEMENT OF THE CASE

In the late 1960's, officials of the City of Akron and of Summit County, Ohio, foresaw an impending solid waste disposal crisis principally triggered by (a) Ohio's new, stringent solid waste disposal regulations, which placed substantial constraints on the future location and operation of landfills, and (b) the fast diminishing capacity of existing landfill sites within the County. [Petitioners' Appendix F at 119a; Petitioners' Appendix E at 62a]

In response, Akron's Planning Department undertook extensive studies of alternative, long-range solutions to the solid waste disposal problem. [Petitioners' Appendix F at 119a-120a; Petitioners' Appendix E at 62a] The City's planners concluded that a recycle energy system ("RES"), designed to incinerate solid waste and to produce energy using the heat generated by incineration, was the best

long-range solution to that problem. [Petitioners' Appendix F at 120a-121a; Petitioners' Appendix E at 62a] However, the RES concept was shelved as economically unfeasible because at the time no potential markets existed for the energy that the facility would generate. [Petitioners' Appendix F at 121a-122a]

Circumstances changed in the early 1970's when Ohio Edison Company, which had been providing steam to Akron's central business district, petitioned the Public Utilities Commission of Ohio to abandon that service. [Petitioners' Appendix F at 108a-109a; Petitioners' Appendix E at 62a] With the steam market now available, the City determined that RES could be economically feasible and presented the best long-term solution to the City's solid waste disposal problem. [Petitioners' Appendix F at 109a] A significant factor in the City's decision to undertake RES was the continuing problems, controversy and litigation generated by the City's only

landfill located in an unincorporated area outside the City. [Petitioners' Appendix F at 122a-124a; Petitioners' Appendix E at 62a]

The City wanted to finance the proposed RES with its own revenue bonds but was advised by its underwriters that the market would not accept its bonds due to its unfamiliarity with the RES technology and the recent New York City financial crisis. Therefore, in 1976, the City asked the Ohio Water Development Authority ("OWDA"), an agency of the State of Ohio, to finance the project. [Petitioners' Appendix E at 62a] In 1975, the Ohio legislature had enacted legislation mandating OWDA, to implement "the public policy of the State . . . to provide . . . efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid waste . . . ." Ohio Rev. Code §6123.03 [Respondents' Appendix A]. To effect its mandate, the General Assembly vested OWDA with power to finance solid waste projects by issuing revenue bonds (Ohio Rev.

Code §6123.04(F) [Respondents' Appendix B]), and in conjunction with such projects and their financing, to enter into cooperative agreements with other governmental agencies containing such terms as are necessary to safeguard ". . . the respective interests of the parties thereto . . . ." (Ohio Rev. Code §6123.13 [Respondents' Appendix C]).

After concluding that Akron's proposed RES would further the state policy the state legislature mandated OWDA to implement, OWDA agreed to finance the project. [Petitioners' Appendix E at 62a] OWDA and its underwriters concluded that in order to market the revenue bonds, it would be necessary to assure the bondholders that RES would receive an adequate supply of solid waste, and that to do so, it would be necessary for the City to exercise its power under Ohio law to require that all solid waste generated within the City's limits be taken to RES for disposal. [Petitioners' Appendix F at 81a; Petitioners' Appendix E at 62a] OWDA imposed this

requirement upon the City in a cooperative agreement entered into between OWDA, the City and Summit County. [Petitioners' Appendix E at 62a] Pursuant to that cooperative agreement, the City enacted the ordinance that Petitioners challenge in this litigation. [Petitioners' Appendix E at 62a]

The ordinance at issue controls only the disposal of solid waste and mixed solid waste (solid waste made up of a mixture of nonrecyclable and recyclable materials). [Petitioners' Appendix E at 62a] The ordinance does not control the disposition of presorted recyclables -- i.e., wastepaper, cardboard, and metals segregated for recycling or other use by the person generating the waste. [Petitioners' Appendix E at 64a]

Petitioners sued to enjoin enforcement of the ordinance. Petitioners' challenge was based upon the Sherman Act, 15 U.S.C. §§1 and 2, the Commerce Clause of the United States Constitution, the due process, equal protection and taking provisions of the Fourteenth

Amendment, and provisions of the Ohio Constitution. The district court found for the Respondents on all claims. [Petitioners' Appendix F] On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. [Petitioners' Appendix E] Petitioners' petition for certiorari on the antitrust and taking issues was granted, the judgment vacated and the case remanded to the Sixth Circuit for further consideration in light of Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982). [Petitioners' Appendix D] The Sixth Circuit remanded the case to the district court for reconsideration of the antitrust issue in light of Boulder. [Petitioners' Appendix E] The district court ruled that Respondents' challenged conduct fell within the Parker v. Brown state action exemption. [Petitioners' Appendix F] The Sixth Circuit affirmed the judgment of the district court. [Petitioners' Appendix A]

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN HOLDING THAT UNDER THE CIRCUMSTANCES OF THIS CASE, RESPONDENTS' CHALLENGED CONDUCT FELL WITHIN THE PARKER v. BROWN STATE ACTION EXEMPTION

To pique interest in their appeal, Petitioners erroneously argue that the Sixth Circuit's decision establishes "a new standard for applying the state action exemption to subordinate state agencies which is in conflict with, and will undermine, the holdings and rationales of a number of the Court's decisions over the past decade." [Petitioners' Brief at 6]

Not so! Analysis of the Sixth Circuit's decision reveals a ratio decidendi consistent with this Court's decisions. While rejecting the district court's conclusion that the statutes governing OWDA specifically authorized OWDA to impose the challenged restraint on the City, the Sixth Circuit, guided by City of Lafayette v. Louisiana Power & Light

Co., 435 U.S. 389 (1978), correctly concluded that this lack of specificity was not dispositive of the Parker exemption issue.

> "A municipality, the plurality held in Lafayette, is not necessarily required 'to point to a specific, detailed legislative authorization before it properly may assert a Parker defense.' However, there must be evidence that the state 'authorized or directed a given municipality to act as it did.' 435 U.S. at 414."

[Petitioners' Appendix A at 18a] The Sixth Circuit next observed that "OWDA's authority to engage in the actions under challenge is somewhere in between a specific state directive and a general, 'neutral' grant of powers" of the type considered in Boulder -- i.e., a general legislative grant of home rule power with no specific authority to act in the area where the challenged conduct takes place. [Petitioners' Appendix A at 18a] As the Sixth Circuit later stated in its opinion, "a state's broad authorization for the financing of waste facilities is not a 'neutral' grant of powers as in Boulder." [Petitioners' Appendix A at 25a]

The Sixth Circuit then applied the touchstone set forth in the plurality opinion in Lafayette for determining whether the Parker exemption applies to such an "in between" case. Specifically, Justice Brennan, after stating that a political subdivision need not "point to a specific, detailed legislative authorization before it may properly assert a Parker defense to an antitrust suit," wrote:

> "While a subordinate governmental unit's claimed Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exist when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" 435 U.S., at 415 (emphasis added).

Under this standard, the applicability of the Parker immunity to any given conduct is dependent upon an analysis of the underlying facts and the authority state law gives subordinate governmental units to operate in the area where the challenged conduct takes place.

In this case, the challenged conduct is municipal monopolization of the disposal of solid waste generated within the municipality. Municipalities throughout this nation have engaged in this conduct since long before the Sherman Act was enacted; and their conduct has been uniformly upheld as a lawful exercise of police power by this and other courts. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325 (1905); In re Vandine, 23 Mass. (6 Pick) 187, 17 Am. Dec. 351 (1827); State v. Orr, 68 Conn. 101, 35 A. 770, 771 (1896); Grand Rapids v. DeVries, 123 Mich. 570, 82 N.W. 269, 273-274 (1900); State v. Robb, 100 Me. 180, 60 A. 874, 877 (1905); O'Neal v. Harrison, 96 Kan. 339, 150 P. 551 (1915) (citing 2 Dillon on Municipal Corporations (5th Ed.) §678: "An exclusive right [to collect garbage and refuse matter] so created is not open to objection that it is a monopoly."); Valley Spring Hog Ranch Co. v.

Plagmann, 282 Mo. 1, 220 S.W. 1, 4-5 (1920); Burns v. City of Enid, 92 Okla. 67, 217 P. 1038, 1039 (1923); Strub v. Village of Deerfield, 119 Ill. 2d 401, 167 N.E.2d 178, 180 (1960). As stated in Wheeler v. City of Boston, 233 Mass. 275, 123 N.E. 684, 686 (1919):

> "These decisions rest in general upon the idea that garbage is widely regarded as an actual and potential source of disease or detriment to the public health, and that therefore it is within the well-recognized limits of the police power, for the municipality, acting for the common good of all, either to take over itself or to confine to a single person or corporation the collection, transportation through the streets and final disposition of a commodity which so easily may become a nuisance. Private interests must yield to that which is established for the general benefit of all."

As the Sixth Circuit said in its first decision in this case:

> "Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances

> regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. See Annots., Validity of Statutory or Municipal Regulations as to Garbage, 15 A.L.R. 287 (1921); 72 A.L.R. 520 (1931); 135 A.L.R. 1305 (1941). If any area of the law can be said to be well settled, this one is."

[Petitioners' Appendix E at 68a] In Ohio, the legislature has long authorized municipalities to collect and dispose of the solid waste [Ohio Rev. Code Ann. §§715.43 and 717.01]; and the state courts have uniformly held that municipalities may exercise their power by monopolizing the collection and disposal of solid waste generated within their limits. State, ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583 (1929); City of Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651 (1939).

It was in this factual and legal environment that in 1975, the Ohio legislature

adopted Ohio Rev. Code Chapter 6123 mandating OWDA to alleviate the growing solid waste disposal problem by financing modern efficient waste disposal projects through the issuance of revenue bonds. Among other things, the legislature authorized OWDA to enter into cooperative agreements with governmental beneficiaries of its financing "with a view of effective cooperative action and safeguarding of the respective interest of the parties thereto." (Emphasis added.) Ohio Rev. Code §6123.13 [Respondents' Appendix C]

In 1976, the City of Akron, unable to finance on its own the RES plant it needed to stave off an impending solid waste disposal crisis, successfully petitioned OWDA to finance the project. However, OWDA was advised by its underwriters that it could not sell its revenue bonds to finance the project without the assurance of an adequate supply of solid waste to fill the RES plant. Given this economic reality and established Ohio

law authorizing municipal monopolization of the disposal of solid waste, OWDA, acting in furtherance of its legislative mandate and pursuant to the contracting authority vested in it by the legislature, required the City to covenant that it would exercise its power to require that all solid waste generated within its limits be taken to the RES for disposal. Pursuant to this covenant the City enacted the challenged ordinance.

Based on these facts, the Sixth Circuit found from the authority the state legislature has given both OWDA and the City to operate in the area of solid waste disposal that Respondents' challenged conduct was a "reasonable and foreseeable exercise" of that legislatively delegated authority. In other words, the Sixth Circuit concluded that the state legislature, in giving OWDA the power and mandate to finance disposal projects for municipalities, contemplated the kind of action complained of. [Petitioners' Appendix A at 21a]

Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of the agency's authority. If the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a 'clearly and affirmatively expressed state policy' to displace competition.

Unlike the general guarantee of legislative autonomy in Boulder, OWDA's powers are expressly limited to the promotion of safe waste disposal systems. . . .

[O]WDA's statutory mandate expressly provides that the agency may contract with other government agencies, including municipalities, to carry out state policy. Under Ohio law, municipalities are expressly authorized to regulate the disposal of waste and construct facilities for the disposal of waste. This authority is granted by statute and not merely claimed by virtue of constitutional home-rule powers as in Boulder. The Ohio courts, as the district court noted in its first decision in this suit, have held that a municipality may exercise this power through a monopoly. See State ex rel Moock v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583 (1929); City of Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651 (1939)."

> We find that the ordinance and agreement under challenge bear a reasonable relationship to the state policy promoted by OWDA and the express powers delegated to OWDA and Akron. The ordinance is limited in scope to the collection and disposal of solid waste, and its promulgation was an essential element of a plan to carry out OWDA's statutory mandate. OWDA's reliance on the statutory authority of a municipality to regulate -- even by monopoly -- the disposal of refuse was a foreseeable result of the legislative grant of power to contract with municipalities." [Petitioners' Appendix A at 20a, 21a, 22a, and 23a]

In short, and paraphrasing Lafayette, the Sixth Circuit found "from the authority given [OWDA and the City] to operate in a particular area [solid waste disposal], that the legislature contemplated the kind of action complained of." Thus, its decision creates no "new standard." To the contrary, it faithfully follows and applies the standard established by this Court in Lafayette and its progeny.

Petitioners premise their "new standard" argument on the Sixth Circuit's conclusion that the statutes governing OWDA, standing

alone, do not constitute a clearly articulated and affirmatively expressed state policy favoring municipal monopolization of solid waste. From this Petitioners leap to the wholly unwarranted conclusion that the Sixth Circuit held "that the state action exemption was not available under the standards established by this Court" and therefore had to create a "new standard" of its own to justify application of the state action exemption to the challenged conduct. [Petitioners' Brief at 8] Petitioners' argument is created out of the air. Nowhere does the Sixth Circuit so hold. To the contrary, the court concluded its analysis, outlined above, with the following holding:

> "We hold, therefore, that the statutory delegation of regulatory power to the City conjoined with the powers and aims of OWDA satisfy the requirement that the challenged actions result from a clearly articulated and affirmative stated policy to displace competition." [Petitioners' Appendix A at 23a]

Petitioners conjure up a parade of horribles: "Recognition of the delegation-of-power principle adopted by the Sixth Circuit would undermine the rationale of the Court's prior decisions and jeopardize important national values." [Petitioners' Brief at 12] "The effect of the Sixth Circuit's decision is that any subordinate agency, no matter how limited its authority, would be given the power to create exempt restraints of trade." [Petitioners' Brief at 13] Nonsense! The Sixth Circuit's decision does not make law: it constitutes a workmanlike and correct application of principles established by this Court in Lafayette and its progeny to the special facts and state law under construction in this case; and it is simply another in a long line of decisions upholding municipal monopolization of the disposal of solid waste as a legitimate exercise of local governmental power.

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT A CITY MAY REGULATE THE DISPOSAL OF MIXED SOLID WASTE, WHICH IS PER SE A NUISANCE, WITHOUT BRINGING ABOUT A TAKING OF RECYCLABLE MATERIALS CONTAINED IN THAT WASTE.

Petitioners do not dispute the general proposition that the City has the right to take without compensation property that constitutes a nuisance and a threat to the health and safety of the community. Nor can they for that right has been solidly established by this Court. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 145 (1978) (Rehnquist, J. dissenting); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 321-23 (1905); Gardner v. Michigan, 199 U.S. 325, 331-33 (1905).

Furthermore, Petitioners acknowledge that this Court has held that municipal monopolization of the disposal of solid waste does not constitute an uncompensated taking of the valuable materials mixed in with the waste.

In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905), this Court considered and rejected a taking claim in a factual context virtually identical to the facts in this case. Defendant haulers ("scavengers") challenged ordinances of the City and County of San Francisco requiring that all solid waste they collected in the City and County be taken to plaintiff's private reduction works for disposal. 199 U.S. at 307-308. The defendants asserted, among other things, that the ordinances in question took their property without just compensation because the solid waste they collected contained recyclable materials. The Supreme Court rejected this claim. Speaking for a unanimous Court, the elder Justice Harlan said:

> "Be all this as it may, the cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded, within the meaning of the

> Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes." 199 U.S. at 323.

See also Gardner v. Michigan, 199 U.S. 325, 332-333 (1905).

Petitioners argue, however, that the California Reduction line of authority and the so-called "nuisance exception" to the taking prohibition are not applicable to the challenged ordinance because (1) the recyclables within the mixed solid waste regulated by the ordinance pose no health or safety threat to the citizens of Akron, and (2) the City is using the solid waste to generate revenue.

Petitioners first argument -- that the recyclable per se pose no health hazard -- misses the mark in that it misconstrues the subject of the ordinance's regulation. The ordinance regulates mixed solid waste, not recyclable materials separate from that waste. In isolation recyclable materials may

or may not be a nuisance; it is unquestioned, however, that solid waste is a nuisance. The presence in solid waste of materials which, in and of themselves, do not constitute a potential danger to the public health does not negate the City's power to regulate the collection and disposal of such solid waste as a whole. As this Court emphasized in California Reduction, a city may regulate the whole or the mass of solid waste because it constitutes a nuisance without regard for the components that make up that mass:

> "The authorities were not bound, prior to the removal of such substances from the premises on which they were found, to separate those that were confessedly worthless from those which might be utilized. The garbage and refuse matter were all together, on the same premises, and as a whole or in the mass they constituted a nuisance which the public could abate or require to be abated, and to the continuance of which the community was not bound to submit." 199 U.S. at 322-23.

The district court specifically found that Akron's solid waste contains materials that

present a danger to the public health, welfare and safety if the mass of Akron's solid waste is not properly disposed of [Petitioners' Appendix F at 93a-94a], and the Sixth Circuit observed in its first opinion that solid waste disposal is as much a problem for cities today as in the past [Petitioners' Appendix E at 71a]. Petitioners do not contest these realities, and they alone justify the municipal action that Petitioners challenge.

Petitioners' second argument -- that the ordinance takes their property because the City is using the solid waste to generate revenues -- is based on (1) an unrealistically narrow view of the Ordinance and its relationship to RES and (2) bad logic.

First, the district court correctly held that the City adopted the ordinance to control a potential nuisance, not to raise revenue to enrich itself.

> "The Court finds that the plaintiffs' understanding of the legislative purpose is overly circumscribed

and removes the ordinance from its proper context. As indicated by the whereas clause on which the plaintiffs rely, the ordinance cannot be separated from the RES. Likewise, the City's purpose in constructing, and in financing the construction of the RES cannot be separated from the ordinance.

* * *

"The Court finds that the ordinance is a regulation adopted to control a nuisance (or potential nuisance) that incidentally impacts on some collectors who separate materials of value from the waste they collect.

* * *

"The ordinance is . . . part of the City's broader scheme to dispose of waste in a safe and sanitary manner at the RES. The ordinance is a reasonable means to achieve this legitimate goal." [Petitioners' Appendix F at 92a, 94a]

Petitioners did not challenge these findings on appeal, they were affirmed by the Sixth Circuit, and they bring the ordinance within the "nuisance exception" to the taking prohibition. Petitioners' argument at p. 20 of their petition that "[t]he Sixth Circuit found (Appendix E at 64a) . . . that the

purpose of the ordinance is to require cost-free transfer to the City of valuable materials to assure a high level of revenues for the RES" is not supported by the cited reference and is wrong.

Second, there is no logical nexus between the fact that RES will generate revenues to defray disposal costs and the conclusion Petitioners would draw therefrom that the ordinance effects a taking. Indeed, extending Petitioners' reasoning to its logical limits leads to the absurd conclusion that there would be no taking if the City simply incinerated the waste and landfilled the residue, recyclables and all, but that a taking has occurred because the City is making good use of the waste to produce saleable steam and recyclable ferrous metal to pay off the bonded indebtedness incurred to make RES a reality. Neither common sense nor decided case law supports such reasoning.

Petitioners' argument that the City's "taking" of the recyclables in the solid

waste they collect equates to an uncompensated taking of land is patently fallacious: solid waste is a nuisance, real estate is not. Furthermore, Petitioners' argument is predicated on the erroneous premise that they acquire property rights in the solid waste they collect in the City which cannot be "taken" by municipal regulation without compensation. Analysis negates this premise. Petitioners' right to collect solid waste in the City is a privilege which the City confers by license. License holders enjoy the privilege of collecting solid waste subject to such conditions as the City reasonably imposes; and they have no right to expect that those conditions will remain static. Thus, they have no basis to complain where, as here, a new condition is imposed which bears a reasonable relationship to the health and safety of the community. As the elder Justice Harlan, speaking for a unanimous court said in California Reduction, supra:

> "Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt." 119 U.S. at 322.

So far as the record herein shows, Petitioners have always derived their rights to collect solid waste in Akron via the licenses the City has granted them and subject to the condition that they comply with all solid waste regulations imposed by the City. Thus, such "rights" as Petitioners can claim in the solid waste they collect in Akron and/or the recyclable materials contained therein have always been subject, ab initio, to the City's overriding right to regulate their businesses. Therefore, the fact that Petitioners have, in the past, been able to freely dispose of the solid waste they collect in Akron gives them no property right but, at most, a hoped-for expectation that they may do so in the future; an expectation ever subject to

extinguishment by reasonable regulation. Thus, as the district court correctly concluded, the ordinance has not taken any protectable property right from Petitioners.

> "[T]he collectors collect waste within the city of Akron only after they have obtained a license to do so. Under the ordinance the city will not seize the waste that is now in the trucks nor the waste in the transfer station. The city is regulating where the waste may be taken for disposal. Before the effective date of the ordinance the collectors are free to choose from among several disposal sites. The ordinance removes that choice, and collectors who continue to collect solid waste in Akron while the ordinance is in force will have to abide by its terms. The ordinance takes from the waste collectors the expectation that they would always be able to take the waste they collected within the city to a disposal site of their choice. The plaintiffs have not shown that this is a property right requiring protection under the fifth amendment." [Petitioners' Appendix F at-95a-96a]

In view of all of the foregoing, Respondents respectfully submit that the Sixth Circuit correctly concluded that this Court's opinions in California Reduction Co. v. Sanitary Reduction Works, supra, and Gardner v.

Michigan, supra, are dispositive of Petitioners' taking claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Ohio Revised Code §6123.03

§6123.03 [Purposes.]

It is hereby declared to be the public policy of the state through the operations of the Ohio water development authority under this chapter to contribute toward one or more of the following: to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid wastes thereby eliminating or decreasing accident and health hazards including rodent and insect vectors of disease, public nuisance and the adverse effect on land values caused thereby and the scenic blight marring the landscape, to assist in the financing of solid waste facilities for industry, commerce, distribution and research, including public utility companies, to create or preserve jobs and employment opportunities or improve the economic welfare of the people of the state, or to assist and cooperate with governmental agencies in achieving such purposes. In furtherance of such public policy, the Ohio water development authority may initiate, acquire, construct, maintain, repair and operate solid waste projects or cause the same to be operated pursuant to a lease, sublease, or agreement with any person or governmental agency; may make loans and grants to governmental agencies for the acquisition or construction of solid waste facilities by such governmental agencies, may make loans to persons for the acquisition or construction of solid waste facilities by such persons; and may

issue waste revenue bonds of this state payable solely from revenues, to pay the cost of such projects. Any solid waste project shall be determined by the authority to be in compliance with Chapter 3734. of the Revised Code and with the regulations adopted by the director of environmental protection under section 3734.02 of the Revised Code. Any resolution of the authority providing for acquiring or constructing such projects or for making a loan or grant for such projects shall include a finding by the authority that such determination has been made. Determinations by resolution of the authority that a project is a solid waste facility under this chapter and is consistent with the purposes of Section 13 of Article VIII, Ohio Constitution, and this chapter shall be conclusive as to the validity and enforceability of the solid waste revenue bonds issued to finance such project and of the resolutions, trust agreements or indentures, leases, sub-leases, sale agreements, loan agreements and other agreements made in connection therewith, all in accordance with their terms.

APPENDIX B

APPENDIX B

B-1

Excerpts from Ohio Revised Code §6123.04

§6123.04 [Powers and duties.]

For the purposes of Chapter 6123. of the Revised Code, the Ohio water development authority may --

* * *

(F) Issue solid waste revenue bonds and notes and solid waste revenue refunding bonds of the state, payable solely from revenues as provided in section 6123.06 of the Revised Code, unless the bonds be refunded by refunding bonds, for the purpose of paying any part of the cost of one or more solid waste projects or parts thereof;

* * *

(I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. of the Revised Code:

* * *

(P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code.

APPENDIX C

APPENDIX C

C-1

Excerpt from Ohio Revised Code §6123.13

§6123.13 [Rental agreements.]

Any governmental agency or combination thereof may cooperate with the authority in the acquisition or construction of a solid waste project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, which agreements shall provide for such contributions by the parties thereto in such proportion as may be agreed upon and such other terms as may be mutually satisfactory to the parties including without limitation the authorization of the construction of the project by one of the parties acting as agent for all of the parties and the ownership and control of the project by the authority to the extent necessary or appropriate for purposes of the issuance of solid waste revenue bonds by the authority.

(3)

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CLERK

No. 84-832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HYBUD EQUIPMENT CORP. & BUDOFF IRON & METAL CO.,
Petitioners-Plaintiffs,

v.

CITY OF AKRON, OHIO, JOHN S. BALLARD, RAY KAPPER, ELSIE REAVEN, JAMES R. WILLIAMS, TIM DAVIS, VINCENT CIRACO, ROBERT L. GOEHLER, REGINALD K. BROOKS, KATHLEEN GREISSING, ROBERT J. OTTERMAN, MICKEY ERITANO, JR., JOHN V. FRANK, DON PLUSQUELLIC, WILLIAM C. GRIMM, ROBERT EDWARDS, COUNTY OF SUMMIT, OHIO, MARK RAVENSCRAFT, TED COLES, DON STEPHENS, AND OHIO WATER DEVELOPMENT AUTHORITY,
Respondents-Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners file this reply brief in support of their petition for *certiorari* pursuant to Rule 22.5 of this Court's Rules.

I. STATE ACTION ISSUE

A. New Standard Adopted By Sixth Circuit

Respondents have asserted in dramatic fashion that the Sixth Circuit did not adopt a new standard, but simply applied to the facts of this case the standard of *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co., Inc.* v. *City of Boulder, Colo.*, 455 U.S. 40 (1982). They incorrectly assert that petitioners based their argument only on the fact that the Sixth Circuit found that the OWDA statute did not constitute a clearly articulated and affirmatively expressed state policy.

Respondents' argument is designed to make the decision below seem insignificant, but their argument ignores the rationale adopted by the Sixth Circuit. It is true that the Sixth Circuit's holding that respondents' actions are within the state action exemption uses the rubric that they satisfy the requirement of a "clearly articulated and affirmatively stated policy to displace competition." (Petitioners' Appendix A at 23a.) However, respondents do not even address, much less explain, the numerous passages in the Sixth Circuit's opinion which make clear that the court reached this conclusory holding by adopting and applying an entirely new standard to the facts of this case.

That the Sixth Circuit evaluated and adopted a new standard is clear from the explicit language of its opinion.

> The plurality in *Lafayette* stressed that an exacting standard for municipalities was necessary to maintain economic order within a state and avoid a multitude of conflicts with national policy. . . . This emphasis on economic atomization within a state suggests that a different standard might apply to an agency with state-wide jurisdiction. (Petitioners' Appendix A at 13a.)
>
> The validity of the district court's finding that OWDA's statutory mandate met the standard of a

> clearly articulated and affirmatively expressed state policy turns on a crucial ambiguity in *Lafayette* and *Boulder*. In those decisions the Court left unclear the degree of specificity in state law necessary to satisfy the standard applied to a nonsovereign state representative. (Petitioners' Appendix A at 17a-18a.)

Speaking of this "ambiguity," the court said that "this problem" is

> . . . whether the interpretation of an ambiguous or open-ended regulatory statute by a state agency can ever constitute "state action" in and of itself under the *Parker* v. *Brown* doctrine. . . . [S]tate regulatory statutes are often drafted in general terms and delegate broad policymaking discretion to a state regulatory agency. (Petitioners' Appendix A at 18a n.9.)

Thus the Sixth Circuit obviously believed, and it so stated, that the question whether respondents' action was within the state action exemption was *not* answered by this Court's decisions in *Lafayette* and *Boulder*. To overcome what the court perceived to be an ambiguity, it adopted a new standard, which focuses not on what the legislature intended but on a court's view of reasonableness:

> If the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a "clearly and affirmatively expressed state policy" to displace competition. (Petitioners' Appendix A at 21a.)

Thus a review of the Court's language—and the reasoning process it used—demonstrates that the Sixth Circuit discussed, formulated and adopted a new standard to fill what it perceived to be a gap in this Court's holdings in this area. This new standard—by focusing on a court's finding that an action is "reasonably related" to agency powers and "reasonably designed" to promote state aims, instead of focusing on what was the legislative intent—puts courts in the business of making decisions very similar

to those made in the era of substantive due process. This is precisely the concern expressed by Justice Rehnquist in his dissent in *Boulder,* 455 U.S. at 60, 67-68.

B. The Authority To Finance Projects By Issuing Bonds Does Not Imply Authority To Restrain Competition

Respondents' suggest that the authority of a state agency to issue revenue bonds for any facility implies that the state has affirmatively granted that agency the power to protect that facility from competition. The error of such an argument in light of *Boulder* is demonstrated by looking at its results. There are other state agencies to which the Ohio legislature has given general financing powers similar to OWDA's, such as the Ohio Development Financing Commission ("ODFC") (Ohio Rev. Code § 122.39, *et seq.*), whose mission is to aid in the financing of all types of local businesses such as shopping centers, restaurants, factories and the like. This statute contains the same type of general authorizing and enabling language as in the OWDA provisions. Following respondents' reasoning, this agency, too, could become involved in local arrangements to insulate these private businesses from competition and thus ensure their financial success.

But surely it would be inconsistent with the principles of *Boulder* to infer that a grant of authority to assist such facilities with revenue bonds involved a decision by the legislature to allow the financing agency to foreclose other restaurants, shopping centers, or factories from competing with the financed project. To infer such from an agency's *financing* authority, whether it is OWDA or ODFC or any of thousands of similarly authorized state bond-issuing agencies in this country, is to ignore legislative intent in favor of a court's view of what is reasonable to accomplish public goals. This is not consistent with this Court's holdings in *Lafayette* and *Boulder.*

C. Respondents' Repetitive Argument That Municipalities Have Often Monopolized Waste Disposal As An Exercise Of The Police Power Is Irrelevant To This Case.

Respondents' brief is largely devoted to the proposition that municipalities have often monopolized waste disposal and that numerous non-antitrust cases have upheld such activities as appropriate exercises of the police power. These assertions are completely irrelevant to this case for several reasons.

First, this argument was not part of the Sixth Circuit's rationale in holding that the respondents' actions were within the state action exemption. This argument is part of respondents' effort to deflect attention from what that court actually said. For instance, respondents cite numerous police power cases on pages 11 and 12 of their Opposition, but none of those cases was cited in the Sixth Circuit's opinion on the state action exemption issue. The Sixth Circuit's only reference to these cases, cited on pages 12-13 of the Opposition, was in its discussion of the Tenth Amendment issue in its *first* decision of this case, the one vacated by this Court. The Tenth Amendment issue is no longer in this case; it was abandoned as a ground of decision by the Sixth Circuit on its further consideration of this case following this Court's remand.

Second, reliance on historical exercises of the police power by municipalities does not meet this Court's standards for determining whether the state action exemption from the Sherman Act is applicable. As detailed in this Court's prior decisions, the standard is whether the State has adopted a policy to displace competition. It is not whether state agencies or municipalities have taken certain actions historically or whether such actions are legal within delegation-of-power principles. That such historical actions are irrelevant to satisfying the standard of *Boulder* is evident in the fact that the two Ohio cases cited by respondents which have upheld municipal monopolization of solid

waste disposal[1] have done so on the basis of the *home rule provisions* of the Ohio Constitution. But, as this Court held in *Boulder,* such broad delegation of power to municipalities through home rule provisions does not meet the requirements for the state action exemption.

Third, the argument is not applicable to the facts here. The City Ordinance being challenged goes substantially beyond any exercise of historical police power based on concern for public health. Respondents have persisted in ignoring the key difference between the public need for the RES project itself and the separate *financial* purpose of the ordinance. The ordinance, as reflected on the face of its preamble[2] and as the Sixth Circuit has found,[3] was enacted not because of any health concern but because of a need to assure the financial security of the RES. The ordinance goes beyond waste disposal to a completely separate, commercial market, the separation and sale for recycling of valuable materials from solid waste. Respondents' actions challenged here have been motivated purely by commercial concerns. The RES will do with the recyclable materials exactly what petitioners have done for years and want to continue doing: separating them out from solid waste destined for disposal and selling them in established scrap markets.

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[1] State ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583, *cert. denied,* 280 U.S. 578 (1929); City of Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E. 2d 651 (1938), *appeal dismissed,* 135 Ohio St. 319 (1939).

[2] Petitioners' Appendix J at 128a.

[3] Petitioners' Appendix A at 3a, Petitioners' Appendix E at 62a.

II. THE TAKING ISSUE

The Challenged Ordinance Contemplates The Uncompensated Taking Of Private Property For The City's Commercial Benefit Instead Of Destroying Private Property As An "Incidental" Result Of Regulating A "Nuisance".

Respondents seek to evade petitioners' taking argument by characterizing the challenged ordinance as merely aimed at regulating a "nuisance," with the purely incidental result of the destruction of petitioners' property. Respondents' reliance on this argument and on *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner* v. *Michigan*, 199 U.S. 325 (1905), is misplaced. Unlike *California Reduction* and numerous other cases, the question here is not whether a valid exercise of the police power to control a nuisance, with the incidental result of destroying private property, is compensable. Here, as the Sixth Circuit itself recognized, the open and recognized purpose of the challenged ordinance was for the City to take the solid waste and valuable recyclables collected by petitioners and other collectors and use them for the City's generation of revenues.[4] It was part of respondents' plan that the RES would generate fees in three ways: from the generation and sale of energy, from the "tipping" fees paid by collectors depositing waste at the facility, and from the sale of recyclables recovered from the solid waste.[5] As the court said, respondents "concede that the agreement and the ordinance were enacted upon the urgings of the project's underwriters in order to guarantee the project's financial success." (Petitioners' Appendix E at 66a.)

Moreover, respondents concede and the Sixth Circuit found[6] that the recyclable materials in the "mixed" waste stream are (1) valuable and (2) *not* a threat to health or

---

[4] Petitioners' Appendix A at 6a, Petitioners' Appendix E at 62a-65a.

[5] Petitioners' Appendix E at 65a.

[6] Petitioners' Appendix E at 64a, 78a.

safety. If the objective of the ordinance were to regulate a "nuisance," as respondents claim, the ordinance properly and logically would allow the private collectors to separate out the valuable recyclables and deliver to the City the remaining "nuisance" waste materials. Materials that petitioners contract with their customers to purchase from them for recycling by definition are not going to be disposed of in a landfill. The ordinance, however, does not allow petitioners to separate out and keep or sell the recyclables, but instead requires all such materials to be turned over to the City in contemplation of the City's selling the valuable recyclables for its own benefit. Respondents' efforts to portray this scheme as a "nuisance" regulation with the incidental result of destroying property is plainly disingenuous.

Respondents further assert the arcane position that because petitioners' business is a "privilege" conferred by the City, no compensable taking can occur. (Opposition at 27-29.) Virtually every business activity is licensed and/or permitted by government, and all in one manner or another are regulated. The fact that a city can grant or deny permits or licenses or otherwise regulate the operation of a business can hardly mean that the city can take without compensation and for its own benefit the property of the business. The use of the right/privilege distinction to permit otherwise unconstitutional actions has been rejected by this Court in other contexts[7] and has no bearing on this case. This Court has never held that the power to regulate includes the right to take private property without compensation for the purposes of enhancing the government's revenues.[8]

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[7] See *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

[8] Moreover, if the City did occupy the waste collection and disposal field, the City would have to bear the costs of that endeavor, whether by paying its own employees or contracting the business out to private companies. Here, however, the City reaps all the benefits by forced appropriation of petitioners' property, but bears none of the costs.

CONCLUSION

The Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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